CalMat Co. *and* International Union of Operating Engineers, Local 12, AFL–CIO. Cases 21–CA–30573 and 21–CA–31336

August 25, 2000

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On May 23, 1997, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the Union filed an answering brief in opposition to the Respondent's exceptions, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions, and the Respondent filed an answering brief in opposition to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order. We reverse the judge's decision and shall dismiss the complaint.

The judge concluded, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with certain information requested by the Union. The judge concluded that the Respondent's alleged failure to supply the Union with the requested information constituted a serious unfair labor practice, which precluded any impasse.[3] Thus, the judge found that the Respondent further violated Section 8(a)(5) and (1) by implementing changes in its employees' terms and conditions of employment on or about March 6, 1995,[4] July 1, and August 21, at which times, according to the judge, no valid bargaining impasse existed. The judge also concluded that the strike, which began on July 26, was an unfair labor practice strike from its inception, and that the striking employees are therefore unfair labor practice strikers.

We reverse the judge, and find that the Respondent did not fail and refuse to provide the Union with requested relevant information in its possession or control, and that the Respondent lawfully implemented changes in its employees' terms and conditions of employment because, prior to these implementations, the bargaining parties had reached impasse on the critical issue of the pension plan on February 16. The impasse affecting the pension plan issue led to a complete breakdown in negotiations and an overall impasse between the parties. Having reached a good-faith impasse with the Union, the Respondent lawfully implemented bargaining proposals contained in its last, best, and final offer.[5] In light of these reversals, we also reverse the judge's conclusions that the strike was an unfair labor practice strike and the striking employees are unfair labor practice strikers.

I. BACKGROUND RELATING TO THE COLLECTIVE-BARGAINING NEGOTIATIONS OF 1994–1995

The instant dispute stems from the collective-bargaining negotiations between the Union and the Respondent for a successor collective-bargaining agreement to the agreement that expired in 1994.[6]

The Respondent, CalMat, Co., is a corporation, engaged in the business of processing and selling rock, sand, gravel, and related products, and has a facility located in Los Angeles, California (with additional facilities throughout the southern California area). The Respondent and the Union have had a lengthy bargaining relationship, with the most recent collective-bargaining agreement between the parties expiring on September 15, 1994. During 1991–1994, the term of the expired agreement, the Union represented between 130–135 of the Respondent's employees. The record also reflects that the Union had negotiated collective-bargaining agreements with employers in the southern California rock, sand, and gravel industry for approximately 40 years.

[1] The Respondent's request for oral argument is denied, as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge therefore did not determine whether an impasse regarding any of the bargaining issues existed. However, he speculated that "lack of impasse would be probable." See sec. III,C, 2,6 of the judge's decision. The judge also stated that if "the Board finds that I erred in" concluding "that Respondent's failure to make a full and complete response to Respondent's Information Requests which I have found relevant preclude[s] a lawful impasse from being declared," then "the Union's insistence on economic data which it had no right to, may give rise to an objectively reasonable declaration of impasse [citations omitted]."

[4] All dates refer to 1995 unless otherwise indicated.

[5] As we discuss below, in a letter dated February 16, that was transmitted by the Respondent to the Union, the Respondent made its last, best, and final offer concerning wages, health and welfare benefits, and overtime pay. In this letter, the Respondent stated that the parties were at impasse. Regarding the pension plan issue, the Respondent stated that "[t]he parties are at irreconcilable odds concerning the fundamental structure of the plan. The Company insists on a defined benefit plan only, while the Union is insisting on a combined defined contribution and defined benefit plan. You have stated you will not change your position on this fundamental issue." The Respondent implemented its wage and health and welfare proposal on March 6. It implemented its proposal regarding the defined contribution rate on July 1, and it implemented its proposals on other bargaining subjects in August.

It is undisputed that the Respondent's proposals contained in its last, best, and final offer were reasonable reflections of the Respondent's proposals throughout the course of the bargaining.

[6] The following section contains uncontraverted facts drawn from the record that are not included in the judge's decision.

From at least 1976 until 1989, the Union negotiated with various employers—including the Respondent[7]—in the rock, sand, and gravel industry in southern California on a multiemployer basis. By bargaining in this fashion, the Union and the multiemployer group would be bound by a single collective-bargaining agreement. In 1989, the Union withdrew its consent to multiemployer bargaining, and negotiated separate collective-bargaining agreements with various employers, including the Respondent, in the industry. The record reflects that, although multiemployer bargaining in the southern California rock, sand, and gravel industry ended in 1989, the Respondent and at least one other employer in the industry, Livingston Graham/Blue Diamond (LG/BD), coordinated their bargaining efforts insofar as the Respondent's chief negotiator would serve on LG/BD's negotiating committee and LG/BD's chief negotiator would serve on the Respondent's negotiating committee.[8]

On July 1, 1994, the Union notified LG/BD of its intention to open negotiations on a successor collective-bargaining agreement. On July 8, 1994, LG/BD acknowledged the Union's notification, and informed the Union that it wanted additional time to explore the possibility of coordinated bargaining with "at least one other signatory company [presumably the Respondent] within the local industry" and the Union.[9] The Union did not object to this suggestion, and the Respondent engaged in coordinated bargaining with LG/BD and the Union. The record reflects that between July 1, 1994, and March 3, the final negotiating meeting before the Respondent implemented its wage and health and welfare proposals, the bargaining parties met approximately 10 times. The parties met on the following dates: August 22, September 9 and 16, October 3, and December 20, 1994; January 16 and 19; February 2 and 13, and March 3.[10] A Federal mediator was present (at the Union's suggestion) at several of the meetings occurring after the October 3, 1994 meeting.

Both parties came to the bargaining table with different views of what they wished to receive in the successor collective-bargaining agreement. Ultimately, there would be little movement—and often no movement—in the parties' positions on the various bargaining proposals.

The Respondent's chief negotiator was its vice president for human resources, Mason Dickerson. Dickerson had approximately 20 years of experience in negotiating collective-bargaining agreements for various employers. The Union's chief negotiating representative was its business manager, William Waggoner, who had worked for the Union in various capacities for approximately 35 years.[11] Like Dickerson, Waggoner had approximately 20 years of experience in negotiating collective-bargaining agreements. At various times, other negotiators, some of whom also testified at the hearing, assisted these individuals at the negotiations.

At the first negotiating session, the Respondent stated that it was seeking the following concessions in its successor agreement with the Union: reductions in wages and health and welfare benefits, an end to wage compression affecting skilled and unskilled employees, and the elimination of the fixed hourly contribution rate[12] ~~that it was required to pay into t~~he unit employees'

[7] The Respondent formerly operated some of its operations under the predecessor name Conrock.

[8] At the time of its negotiations with the Respondent and LG/BD, the Union was also negotiating successor collective-bargaining agreements with a number of other employers in the rock, sand, and gravel industry in southern California. As a result of these negotiations, the Union filed virtually identical unfair labor practice charges alleging that these employers failed and refused to bargain in good faith concerning the same pension plan at issue here; implemented changes in a pension plan in the absence of a good-faith impasse; and implemented changes in a pension plan in a manner which unlawfully fragmented pre-impasse proposals. After investigating and considering these charges, the General Counsel refused to issue complaints against any of these other employers. (At the time of the hearing involving today's case, some of the above-mentioned cases were still pending in the Office of Appeals.) In his decision, the judge stated, "[T]hat the General Counsel has never made it clear to me why [Calmat and LG/BD] have been singled out for prosecution when the Union claims all other employers in the industry have also made alleged unlawful implementations. Moreover, as I understand it, the Union filed identical charges against all of the employers, but only those against Respondent and LG/BD were found to have merit. In any event, my bewilderment implies no legal significance for Respondent."

See the judge's decision at sec. III,B,2,c, fn. 15.

On August 15, 1996, the General Counsel issued a consolidated amended complaint and amended notice of hearing against the Respondent. In this complaint, which contains the allegations at issue today, the General Counsel ordered that the cases against the Respondent be consolidated with Cases 21–CA–30576 and 21–CA–31337 against LG/BD. The allegations contained in the complaint relating to LG/BD were essentially the same as the allegations against the Respondent. Therefore, both Calmat and LG/BD appeared as Respondents at the hearing. On October 28, 1996, during the hearing, the judge was informed that LG/BD and the Union had arrived at a private non-Board settlement. The judge thus severed the settled case involving LG/BD from the proceedings.

[9] Coordinated bargaining between the Union and the Respondent and LG/BD began on August 22, 1994. However, as we discuss below, the Union, on September 9, 1994, stated that it would not agree to further coordinated bargaining. Thus, after September 9, 1994, the Union bargained with the Respondent and LG/BD separately, except to the extent that a member of the Respondent's negotiating committee served on LG/BD's negotiating committee, and a member of LG/BD's negotiating committee served on the Respondent's negotiating committee.

[10] The record is replete with testimony and correspondence alleging that both parties engaged in dilatory, bad-faith bargaining. We also note that Respondent alleged in an unfair labor practice charge that the Union bargained in bad faith, and the Union alleged in an unfair labor practice charge that the Respondent bargained in bad faith. The General Counsel refused to issue a complaint on either of these allegations.

[11] Waggoner also had experience serving as a trustee on the Operating Engineers' pension plan (not the pension plan that is one of the subjects of today's dispute).

[12] The contribution rates at issue involve the Respondent's contributions per hour worked, not the employees' contributions per hour worked.

it was required to pay into the unit employees' pension plan. The Respondent argued that the economic climate allegedly adversely affecting the southern California rock, sand, and gravel industry[13] required the Union to make concessions so that the Respondent could maintain its economic viability. Significantly, the Respondent maintained that it had to remain competitive with nonunion competitors who were paying less in wages and benefits than the Respondent was required to pay under its expired collective-bargaining agreement, an agreement in which the Union had won increases in wage rates and health and welfare benefits. The Respondent's drive for concessions occurred in the context of the recent results of its successful negotiations with four other unions in the southern California area.[14]

In addition to seeking reductions in wages and health and welfare costs, the Respondent contended at the first meeting between the parties that it wanted to rectify a wage compression problem that was allegedly adversely affecting employees' morale and pay. In the Respondent's view, the pay rates of skilled and unskilled employees were excessively compressed—only a few dollars an hour separated the wage rates of skilled and unskilled workers. (The Respondent employs a greater number of skilled workers than unskilled workers.) To remedy this wage compression, the Respondent proposed grouping employees into two or three pay groups (instead of the then-existing four) and to make pay reductions in the successor agreement that would be commensurate with employees' skills and the wage rates that skilled and unskilled workers in the industry received in the marketplace. Under the Respondent's proposal, unskilled workers would receive a greater pay reduction than skilled workers. The Respondent contended that, in terms of defining and evaluating the relevant marketplace for skilled and unskilled workers in the bargaining unit, its wage rates should be compared with those paid by Owl Rock,[15] its chief nonunion competitor in the southern California rock, sand, and gravel industry.

Most importantly, in addition to seeking the abovementioned changes, as well as changes affecting holidays and other comparatively minor collective-bargaining subjects, the Respondent sought to modify the pension plan scheme under which it was obligated to contribute a fixed hourly amount to the bargaining unit employees' pension plan. The judge found, and we affirm, that the pension plan issue "was to become of paramount importance in the negotiations."[16]

The pension plan at issue is entitled the "Southern California Rock Products and Ready Mix Concrete Industries—Operating Engineers Retirement Fund" (pension plan). As the judge found, the pension plan is a multiemployer plan administered by the Employers' Pension and Insurance Committee (PIC). The governing trustees of the PIC are either management representatives or are selected by the participating employers. Participating employers also select the counsel for the PIC.[17] The record demonstrates that the plan is a defined benefit plan *with* a fixed contribution rate,[18] and the parties historically bargained over both of these components. The fixed contribution rate was set forth in the most recently expired collective-bargaining agreement between the parties as it had been in previous collective-bargaining agreements between the parties, but is not, unlike the benefit levels, considered to be part of the pension plan itself. In practice, the pension plan ~~operated as follows: historically, the~~ parties negotiated a

[13] We attach no evidentiary weight to the fact that an economic recession may or may not actually have been adversely affecting the rock, sand, and gravel industry in southern California, and we note that the judge correctly refused to allow evidence to this effect to be presented at the hearing.

Additionally, the Respondent has excepted to the judge's decision to sustain the Union's objection to evidence regarding the Union's upcoming and allegedly significant negotiations with AGC (another employers' group). We affirm the judge's evidentiary ruling to sustain the Union's objection.

[14] Prior to the Respondent's negotiations with the Union, two other unions—Teamsters Locals 420 and 166—agreed to concessions in their new collective-bargaining agreements with the Respondent that would save the Respondent approximately 14 percent in wages and benefits costs. Another union, Teamsters Local 186, which also bargained for a new agreement with the Respondent, would not accept concessions of this magnitude, and decided to strike. Eventually, Local 186's unit employees made an unconditional offer to return to work. Local 186 and the Respondent could not reach an agreement, however, and, at the time of the hearing, Local 186's unit employees were working under implemented terms and conditions of employment. These implemented terms and conditions of employment resulted in concessions for the Respondent that were similar to the results it received from the other Teamsters locals. Finally, during the same period in which it was engaged in the negotiations at issue, the Respondent successfully negotiated a new collective-bargaining agreement with similar concessions of approximately 14 percent from a Machinists local.

[15] The record reflects that at some point Owl Rock and another employer called Robertson became a single employer known as Owl Rock/Robertson.

[16] Decision, sec. III,B,2,c,1.

[17] As the judge found, the pension plan is not a "Taft-Hartley"plan; the plan is not jointly administered, and as originally devised, unions had no role in the administration of the fund. See Sec. 302 of the Labor Management Relations Act 1947, 29 U.S.C. Sec. 186 (1998).

[18] The following is a general description of the difference between a defined benefit plan and a defined contribution plan:

> In a defined contribution plan, the employer contribution is fixed or determined by a formula and benefits are based on the contribution of the employer. A defined benefit plan is one in which the contributions to be made are calculated to achieve a specific benefit at a time certain in the future. *American Assn. of Retired Persons v. Farmers Group, Inc*., 943 F.2d 996, 999 fn. 2 (9th Cir. 1991). Further, under a defined contribution plan, each participant has an individual account; the level of benefits that he or she receives depends upon the performance of the assets retained in the individual account. In contrast, under a defined benefit plan, the employee is entitled to a fixed period payment upon retirement regardless of the performance of the underlying assets.

Systems Council EM-3 v. AT&T Corp., 159 F.3d 1376, 1380–1381 (D.C. Cir. 1998).

historically, the parties negotiated a benefit level (a dollar value) for each credit an employee would receive. For each 1000 hours that an employee works, he or she received 1 credit. In addition to negotiating the benefit level, the parties also negotiated the contribution level, which, as stated above, is an amount locked into the term of each collective-bargaining agreement. In the most recent collective-bargaining agreement (1991–1994), the contribution level was set at $3.35.[19] The record also reflects that, during the term of the most recent collective-bargaining agreement, the benefit level contained in the pension plan was set at approximately $37 per credit.

During the negotiations at issue, the Respondent proposed increasing the benefit level by $2, and stated that it would agree to be bound to the increased level, so long as the Union agreed to eliminate the fixed contribution rate. The Respondent believed that, based on actuaries' reports, it could increase the benefit level *and* reduce the contribution rate contained in the agreement. Furthermore, the Respondent maintained that it could use the resulting 80-cents reduction in the hourly contribution rate to offset proposed reductions in wages. Throughout the course of the negotiations, the Union sought to increase the benefit level; at one point, it proposed increasing the benefit level by $8. Also, throughout the course of the negotiations, the Union adamantly maintained that it opposed the Respondent's proposal to eliminate the fixed contribution rate.[20]

The pension plan had not always operated in a predictable manner. The plan was overfunded in 1989 and 1994, and, on at least one occasion, the plan had been underfunded. To remedy the underfunding, the Union asked its members to increase their contributions to the plan by 50-cents per hour. These occurrences suggest that there was a mismatch regarding the fixed contribution rate, actuarial projections, the success of the PIC's investments, and the benefit level.

When the plan was overfunded, some of the Respondent's contributions to the plan lost their tax-deductible status.[21] The parties differed as to how to respond to the overfundings: the Respondent believed that because the pension plan was overfunded, it could reduce its contributions, while the Union believed that the Respondent's contributions should remain the same but that employees' benefit levels should be increased because the plan contained excess funds.

For purposes of the instant dispute, the court-approved settlement of 1991 contained the 18th amendment to the pension plan. Under section 8.1(a) of the 18th amendment, subject to two exceptions not relevant here, any amendment to the pension plan

> shall become effective only if it has been agreed to between the Union and at least two-thirds . . . of the Employers who are then parties to Basic Labor Agreements requiring Employer Contributions which meet the requirements of Section 3.1, which, in the aggregate, employ at least three-fourths of the Employees who are then in Covered Employment (not counting for this purpose Employees who are then on layoff or on authorized leaves of absence).

[19] Art. XVII (Pension) of the most recent collective-bargaining agreement states, in pertinent part:

> The Employer will make contributions to the [pension plan] for the benefit of [bargaining unit employees]. . . . The hourly contributions to the Industry Retirement Plan shall be made, for all hours worked or paid for, as follows:
>
> | Effective date | Amount |
> |---|---|
> | 1-1-91 | $3.35 |
>
> In the event that Federal or State legislation requires a revision of the Industry Retirement Plan which results in a higher contribution rate to meet funding requirements, the increased contribution rate will come out of the wage package. . . .

This article is identical to those in the collective-bargaining agreements that the Union had with various other employers in the rock, sand, and gravel industry in southern California.

[20] The record reflects that at one point in the negotiations, Union Negotiator Waggoner responded that he could not make a decision regarding the Respondent's proposal to apply the 80-cents reduction in the hourly contribution rate to its proposed wage reductions unless he obtained the union members' consent.

[21] When the pension plan was overfunded, the Union twice filed class-action lawsuits against the PIC in Federal court. The first lawsuit resulted in a Federal district court-approved settlement in 1991. In its opinion affirming the Federal district court's granting of summary judgment for the defendant in a second lawsuit filed by the Union against the PIC in 1994, the Ninth Circuit summarized the operation of the pension plan: "Employers contribute at a specified hourly rate; participants are paid at a rate determined by their total service. There is no guarantee that contribution levels will match benefit levels, and in recent years, the plan has been overfunded. Because the plan's assets have exceeded its actuarially accrued liabilities, some contributions have not been tax-deductible by employers." *Collins v. Pension & Insurance Committee of the Southern California Rock Products & Ready Mixed Concrete Assn.*, 144 F.3d 1279, 1281 (9th Cir. 1998).

The decisions of the Federal courts involving the pension plan at issue do not, of course, have any bearing on our determination of whether the parties reached a good-faith impasse in this case. As stated by the Ninth Circuit, "the union argue[d] [that] the district court [which granted summary judgment in favor of the PIC in the 1994 lawsuit] erred by giving the employers' declaration of impasse a presumption of finality rather than waiting for the NLRB to decide whether the declaration was proper. However, the district court expressly refused to decide the impasse issue, explaining that '[I]t is for the NLRB, and not this Court, to decide whether the Employers continue to have an obligation to contribute to the Pension Plan, and at what level.'" Id. The Ninth Circuit denied the plaintiffs' motion to supplement the record before it with the complaints issued against Respondent CalMat and LG/BD in February 1996. Id. at fn. 1. The court stated that the complaints "are not relevant because the district court did not find an impasse had been reached and because [the lawsuit before the court] involves only an alleged fiduciary breach by the Administrator." Id.

We note that the Ninth Circuit held, in part, that the pension plan administrator was not required under the plan (or under ERISA) to increase benefits when the plan was overfunded. Id. at 1283. The Ninth Circuit's conclusion supplies us with probative evidence regarding the plan's requirements, but does not, of course, impact our determination of whether there was a good-faith bargaining impasse between the parties.

Section 3.1 of the 18th amendment to the pension plan states, in pertinent part:

> The cost of funding benefits shall be provided by Employer Contributions *in accordance with the Basic Labor Agreements*; provided, however, that the Plan shall not receive Employer Contributions at less than that rate per Covered Hour which is required at any point in time in the Basic Labor Agreements of at least two-thirds . . . of the Employers whose Agreements require Employer Contributions, and which then, in the aggregate, employ at least three-fourths of the Employees who are then in Covered Employment. [Emphasis added].[22]

Starting at the first negotiation meeting, Dickerson, the Respondent's chief negotiator, emphasized to the Union the necessity of avoiding future lawsuits against the PIC. To this end, Dickerson proposed that the fixed contribution rate contained in the parties' most recent collective-bargaining agreement be reduced from $3.35 to $2.55 an hour, and that instead of being set in stone for the length of each collective-bargaining agreement, the contribution rate should be allowed to "float." Under the Respondent's proposal, the Respondent and the Union would continue to negotiate over the benefit levels, but the Respondent would be permitted to rely on actuarial reports which would determine the amount of money that was needed at any given time to fund adequately the specified benefit level. After receiving the actuarial data, the Respondent would adjust the "floating" contribution rate accordingly (either increasing or decreasing it when necessary).[23] In brief, the fixed contribution rate would, under the Respondent's proposal, become a variable rate linked to more current actuarial data and the success (or lack thereof) of the PIC's pension plan investments. Under the Respondent's proposal, at no time would the negotiated benefit level affecting employees' payments per credit fall below the agreed-upon amount. The Respondent believed that its proposal to eliminate the fixed contribution rate would prevent the reoccurrence of situations in which the pension plan had been overfunded or underfunded.[24] As we discuss below, Dickerson repeatedly emphasized the significance of the pension issue in his correspondence with Waggoner, the Union's chief negotiator. The Union's bargaining behavior ~~demonstrated that it, too, viewed th~~e pension issue as onstrated that it, too, viewed the pension issue as critical to the success of these negotiations.

The Union was adamant throughout the negotiations that the Respondent's contribution rate remain as a fixed, non-ariable amount. And, from the Union's perspective, none of the Respondent's desired concessions were acceptable. In fact, the record reflects that although the Union was (at least generally) aware that the Respondent had gained concessions from the other unions, the Union drew a firm line against concessions.[25] The Union's opposition was influenced, in part, by its beliefs that the Respondent's proposal threatened the financial solvency of the plan, and that the Union would, under the Respondent's proposal, lose any input it may have had regarding the administration of the plan.

Regarding the Respondent's other bargaining proposals, the record reflects that the Union did not view as dispositive the fact that other unions, as discussed above, had agreed to make significant concessions in their successor collective-bargaining agreements with the Respondent. The judge found that, at the first negotiating meeting, Waggoner informed the Respondent's negotiators that what the other unions did would not affect the Union's negotiations with the Respondent.

Confronted with the Respondent's stated position that it wanted to reduce wages and health and welfare benefits in the successor collective-bargaining agreement to remain competitive with its nonunion competition, the Union requested certain financial information from the Respondent. The Union described these information requests in its correspondence with the Respondent. On January 16, the Union sent the Respondent a letter containing numerous requests for information. The letter stated, in pertinent part:

> In order to evaluate the Company's need for concession[s], Local 12 is hereby requesting, pursuant to Section 8(a)(5) of the [Act] disclosure of the following . . . [a]ny and all memos, reports, studies, records, or other documents within the Employer's possession and/or control which analyze any of the following factors with respect to the Employer's competitors: productivity, labor and material cost, prices, profits and losses.

[22] At the hearing before the judge—but not during the negotiations at issue—the Union's chief negotiator, Waggoner, stated that he believed the language of sec. 8.1(a) of the 18th amendment precluded the Respondent from changing its contribution rate without the Union's consent. The Respondent disputed the Union's contention. For the purpose of resolving the instant dispute, it is unnecessary for us to interpret the meaning of the 18th amendment to the pension plan.

[23] Under the proposal, these adjustments would be based on actuaries' reports, and would occur annually.

[24] See discussion, above.

[25] A union publication (entitled the International Union of Operating Engineers News Record) distributed to members in August/September 1994 states:

> Pre-negotiation meetings have been held with rock, sand, and gravel members. We scheduled the meetings early knowing that negotiations are going to be tough this year because of the wage concessions the [T]eamsters already have agreed to. The members in attendance [at a Union meeting] were very emphatic about not accepting a reduction in their hourly rate. We have had our first session with CalMat, Livingston-Graham and Blue Diamond. They did not submit a wage offer but our suspicion about them "taking on" Local 12 was verified after reviewing their entire proposal.

On January 19, the Respondent sent a letter to the Union in response to the Union's January 16 letter. The Respondent's January 19 letter (which was delivered by Dickerson to Waggoner at the January 19 bargaining meeting) states, in pertinent part:

> CalMat wants [the concessions] because we will be paying over market without them. As we have told you at the bargaining table, we understand that Owl Rock Products, a major competitor and several smaller operators are non-union with lower wages and benefits than CalMat. For example, at Owl Rock products, we understand that the top hourly wage rate for a conveyorman is $15.50, the top wage rate for a skyloader operator is $18.50 and the top wage rate for a heavy duty repairman is $20.50. Additionally, other unionized competitors are seeking substantial reductions in wages and benefits in their negotiations.

The Respondent also responded to the Union's request for financial information about the Respondent's nonunion competitors in a letter sent from the Respondent to the Union on February 9. In pertinent part, this letter, which is contained in the record, states as follows:

> As I informed you [Waggoner] at the meeting, CalMat's response [to the Union's request for financial information] is contained in our letter to you dated January 19, 1995. It is still our position that Local 12's request for financial information is irrelevant, and CalMat need not respond to it. We have provided you with information concerning Owl Rock Products' rates of pay both at the bargaining table and in our letter of January 19, 1995. As you are no doubt aware, there are numerous other companies paying substantially less in wages and benefits than CalMat currently is. Examples include P.W. Gillibrand in Simi Valley who is paying from $12.00 to $16.00 per hour for operators. Quality Rock in Moorpark pays $7.00 per hour for "unskilled" up to $13.00 for "skilled" personnel. Channel & Basin [R]eclamation, Inc. pays, on average, from $12.00 to $14.00 per hour for its workers, with a $10.00 per hour top rate for Conveyorman. Empire Rock in Alta Loma pays its Repairman up to $20.00 per hour with Operators in the $18.00 to $20.00 range. Additionally, these companies, overall, pay less in benefits than CalMat is proposing. The above confirms that what we have proposed in wages and benefits is competitive, and in many cases, surpasses what other companies are paying.

The letter also stated that Triangle Rock, Irvine Lake was not a direct competitor to the Respondent, and, as such, Triangle Rock's pay rates were irrelevant. The final portion of the Union's information requests at issue today is contained in its letter dated February 13, written in response to the Respondent's letter dated February 9. In this letter, the Union's Waggoner stated, in pertinent part:

> I must again renew my request for the financial information previously demanded. Your employees are entitled to see this information before they can knowledgeably cast a vote as to whether to ratify an agreement containing the drastic cuts you propose. I do not know how, in good conscience, I can submit a proposal such as this with a recommendation for approval by the membership unless these records are turned over for inspection. With regard to the information you have given us concerning your so-called competitors, that information is incomplete and worthless. Where are these so-called competitors located? How many Operating Engineers do they employ? What prices are they charging? How many jobs have they taken away from you? Without such information, there is no way for us to judge whether *any* reductions in pay, let alone the cuts you seek, are justified.
>
> With regard to Triangle Rock, your conduct and contradictory statements leave many questions unanswered. Who owns this operation? When will the deal at Irvine Lake be finalized? What will happen to the employees? Also, how can you complain about non-union 'competition' when you wind up competing against yourself? What we are faced with here is an operation being sold by one union employer to another union employer, with a threat to operate it non-union. You tell me how Local 12 is supposed to interpret such conduct. [Emphasis in origianal.]

II. THE BARGAINING SESSIONS

The parties' general bargaining positions have been described above. The following is a more detailed description of the significant occurrences and statements at the bargaining meetings from August 22, 1994, until May 30, 1995.

As described above, on August 22, 1994, Dickerson, the Respondent's chief negotiator, informed the Union that the Respondent was seeking reductions in wages and benefits that were comparable to the reductions the Respondent had received from other area unions. (Waggoner, the Union's chief negotiator, testified that although he was generally aware of the results of the negotiations between the Respondent and the Teamsters, the Union did not view those results as a significant factor affecting its negotiations with the Respondent.) Regarding wage concessions, Dickerson informed the Union's negotiator at this meeting that the Respondent was seeking reductions in wages that would reduce wages to a level that was comparable to wages paid by Owl Rock, the Respondent's chief nonunion competitor. The Respondent informed the Union that it wanted to remedy the wage compression problem (to reduce the wages paid

to unskilled workers, whose hourly pay rate was bumping up against the hourly pay rate of skilled workers), and to eliminate the fixed hourly pension plan contribution rate, which had led to past lawsuits. The Union objected to each of these proposals. At this meeting, the Respondent tendered its first written proposal to the Union, and the Union tendered its first written proposal to the Respondent. The Respondent's proposal contained, inter alia, the elimination of the fixed pension plan contribution rate in the prior agreement, a revision to the method of overtime pay, a reduction in paid holidays (from 8 to 3), the deletion of the "and future" clause from the agreement, a cap on the vacation benefit schedule at 80 hours over the term of the agreement, and a $37-pension benefit credit.

The Union's initial proposal contained several benefit increases: increasing vacations, adding an additional holiday (from 8 to 9), increasing the Respondent's cap for health and welfare contributions from $510 to $559 per month, and increasing shift premium pay to 40 cents from 35 cents for employees reporting to work between 9 a.m. and before 6 p.m., and to 45 cents from 40 cents for employees reporting to work at or after 6 p.m. and before 12 a.m. Additionally, the Union proposed to maintain, without modifications, the current overtime payment system. Regarding the pension plan, the Union proposed retaining the current contribution rate system and increasing benefit credits from $37 to $38, $39, and $40 over the course of the 3-year agreement.

The second bargaining meeting between the parties occurred on September 9, 1994. At this meeting, the Union presented the Respondent with a letter in which it objected to coordinated bargaining between the Respondent and LG/BD. The parties did not exchange any proposals, and each side maintained its bargaining positions, which were unchanged from the positions expressed on August 22.

The third bargaining meeting occurred on September 16, 1994. The Respondent provided its second set of proposals to the Union, and Dickerson stated that the Respondent was seeking concessions of approximately 20 percent.[26] Regarding the wage compression issue, the Respondent proposed reducing the number of wage groups, and submitted a list of three wage groups. The Union did not make any new bargaining proposals, and it did not change its bargaining positions. Sometime during the course of this meeting, Waggoner asked the Respondent to supply the Union with certain financial records. Dickerson responded that this information was contained in the Respondent's annual reports, and that the Union already possessed these reports.

The fourth bargaining meeting occurred on October 3, 1994. Again, the Union made no proposals, and did not change its bargaining positions. Nor did the Union reiterate its information request. The Respondent presented its third proposal, which addressed proposed wage reductions within the three wage groups it had proposed establishing. The Respondent also proposed, in the area of health and welfare benefits, to retain the Union's Health and Welfare Plan, but to reduce the Respondent's cap on contributions to $375 from $475.

After the October 3 meeting, the Union canceled two meetings with the Respondent which had been scheduled for October 10 and October 14, 1994. The parties would not meet again until December 20, 1994. Significantly, Dickerson, the Respondent's chief negotiator, sent a letter to Waggoner on October 31, 1994. In this letter, Dickerson requested future meetings to continue the negotiations, and requested the Union to advise the Respondent of its availability for further bargaining. In this letter, Dickerson reiterated the Respondent's proposals regarding the pension plan, and presented a detailed description of this proposal:

> In preparation of our next meeting, we have enclosed [our] proposal regarding pension benefits. As you can see, the Company proposes to *increase the pension benefit factor by $2.00 (from $37 to $39 per month) retroactively effective October 1, 1994*. There seems to be a misunderstanding among many of our employees on the pension issue. We are told that [the Union] is saying that the Company is attempting to take away pension benefits. Nothing could be further from the truth. We have not at any time in these negotiations proposed a pension benefits reduction. To the contrary, we now offer an increase! As you are well aware, the employees' pension plan is a *defined benefit plan*. Yet, for years, our agreement with [the Union] has also defined the amount of the Employers' *contribution*, a very, very unusual agreement.
>
> This has led to two lawsuits. This simply cannot continue. We must define the benefit—not the contribution. Our proposal to increase the benefit factor to $39 per month is simple and straightforward. Eligible retiring employees (your members) will receive $39 per month for each year of credited service—guaranteed! The company is absolutely obligated to provide the monthly benefit. According to estimates from the actuaries, the Company is able to offer the $2 increase in benefits and still save approximately $0.80 per hour in future contributions. This is especially good news during these times of "roll-back" contracts. We can increase the pension benefit and use the $0.80 to offset the proposed reductions in wages. This may be our best opportunity for a win-win situation. We look forward to discussing this and other issues during our next

[26] The 20-percent figure was an increase from the 14-percent estimate the Respondent had mentioned at the first bargaining session.

meeting, which hopefully is very soon. [Emphasis in original.]

On November 10, 1994, Waggoner wrote back to Dickerson, and stated, in part, that "[n]egotiations between [the Union and the Respondent] have been unproductive to date because of the unacceptable demands in your proposal." Waggoner also stated that he was "requesting that federal mediation be invited in any future negotiations" between the parties. On December 13, 1994, Dickerson, in a letter to Waggoner, stated that although Respondent believed that the Union's request for Federal mediation was premature, it was nonetheless willing to meet with a Federal mediator present. Dickerson expressed displeasure at what he viewed as the Union's dilatory approach toward the bargaining, and requested that the Union come to the next meeting prepared to schedule enough bargaining sessions so that the parties could reach agreement by a target date of January 20. Dickerson proposed 13 days on which to meet, and noted that he would be amenable to other meeting times throughout December and January.

On December 20, 1994, more than 2 months after their fourth meeting, the parties returned to the bargaining table. In the presence of the mediator, the parties discussed the Respondent's proposals contained in its above-quoted letter of October 31. The Respondent increased its proposed cap on health and welfare benefits from the $375 figure mentioned in the letter to $400. The Respondent also noted that it had proposed to increase the current pension benefit level to $39, proposed increasing its vacation cap from 80 hours to 120 hours for the term of the agreement, and increasing holidays to 4. The Respondent also increased reporting pay from 2 to 4 hours. Also, the Respondent supplied the Union with cost data relating to its bargaining proposals.

The Union did not submit any written proposals at this meeting. After Dickerson urged the Union's negotiators to make a bargaining proposal, Waggoner stated words to the effect of, "[W]e'll give you a proposal": a 1-year extension of the (expired) collective-bargaining agreement with a wage freeze, a 25-cent increase in the Respondent's health and welfare contribution cap, and a $6 increase in the pension benefit level. Dickerson rejected these proposals, and stated that concessions had to be competitive. Dickerson reiterated that the Respondent was primarily concerned with wages paid by Owl Rock/Robertson. Waggoner asked for these wage rates, and Dickerson responded that Waggoner knew what they were. Dickerson then asked Waggoner if it would be possible to meet before January 16. Waggoner stated that the Union could not meet before that date. Dickerson asked Waggoner if the Union could mail its proposals to the Respondent so that the Respondent could have time to study the proposals. Waggoner stated that he could not promise anything, and stated that he had to leave the meeting early to study the Respondent's modifications to its proposals.

In a letter dated January 6, Dickerson stated, in part, that the Respondent wanted to reach an agreement by January 20, and that it was willing to meet for bargaining at anytime. Dickerson also expressed frustration about what he believed was the Union's dilatory approach toward bargaining and lack of rational proposals.

The sixth bargaining meeting occurred on January 16 (the date the Union had insisted upon at the December 20 meeting). Both parties exchanged bargaining proposals. The Respondent proposed increasing its wage proposal (which still constituted an overall wage reduction from the expired wage rates) by $1.35 over the term of the agreement and to increase the cap on its health and welfare contributions to $425 effective the second year of the agreement, and $450 effective the third year of the agreement. Additionally, the Respondent proposed increasing pension benefits by $1 a year over the course of 3 years (from $39 to $40 to $41). Respondent's proposal regarding the pension benefit level constituted increases over the then-current $37 benefit level. However, the Respondent continued to insist—as it had from the beginning of the bargaining—that the fixed contribution rate, be eliminated.

The Union's written bargaining proposal contained the following: a 75-cent wage increase in the wage rates contained in the expired agreement; and an increase in pension benefits (an increase to $39 on October 1, 1994, and an increase to $43 on July 1). The Union continued to insist that the contribution rate remain in the agreement. At the conclusion of this meeting, Waggoner presented Dickerson with a written information request, which is quoted above in the letter dated January 16. As the judge correctly found, only a portion of Waggoner's information request is at issue in this case, insofar as the complaint does not allege that the Respondent claimed an inability to pay.[27] Dickerson's response to Waggoner's information request is quoted above, in the letter dated January 19, and was that the Respondent's chief nonunion competitor, Owl Rock, paid substantially less in wages than did the Respondent. Further, Dickerson stated that the Respondent did not possess

[27] The relevant portion of the complaint alleges that the Respondent unlawfully failed to provide the Union with the following information: First, "[a]ny and all memos, reports, studies, records, or other documents within Respondent's possession and/or control which analyze any of the following factors with respect to Respondent's competitors: productivity, labor and material cost, prices, profits and losses"; second, information with respect to the Respondent's competitors' "locations, the number of operating engineers they employ, the prices they are charging, and the number of jobs they have taken from Respondent." The General Counsel did not issue a complaint with respect to the other portions of the Union's information requests, which relate to the Respondent's records regarding its financial ability to pay.

studies or analyses regarding competitors' productivity, labor and material costs, prices and profitability.

The seventh bargaining meeting occurred on January 19. Both parties exchanged bargaining proposals. The Respondent's proposals and positions were essentially unchanged. The Union did not make any economic concessions from the terms of the expired agreement; to the contrary, the Union proposed an overall wage increase of $1.50 (as noted above, it had proposed a 75-cent increase at the sixth meeting) over the expired wage rates. The Respondent rejected this proposal. The Union made certain noneconomic proposals. Waggoner left before Dickerson could respond to these proposals and told Dickerson to put his responses in the mail.

The eighth bargaining meeting occurred on February 2. The primary topic of discussion was the pension plan. At this meeting, neither party modified its economic proposals. The Respondent continued to insist on the elimination of the fixed contribution rate; the Union continued to oppose this. The Respondent stated that by reducing the contribution rate by 80 cents, it could apply this savings to its proposed wage reductions, thereby limiting the amount of these reductions. Waggoner questioned whether the Respondent had the legal authority to bargain over the pension without the agreement of other participating employers,[28] and stated that he would not have any authority to bargain over the 80-cents savings until the Union's members granted him this authority. In response to Waggoner's question regarding the Respondent's authority to bargain over the pension plan, Dickerson told Steve Billy, a union negotiator, that the Respondent had veto power over changes to the pension plan. In this connection, without indicating his position on the Respondent's proposal regarding the application of the 80-cents savings, Waggoner asked the Respondent to prepare a letter stating that the Respondent was authorized to apply the proposed 80-cents savings to wages and benefits. The parties went back and forth regarding who should make the proposals concerning the 80-cents savings. Dickerson stated that, as he saw it, the 80-cents reduction in the amount of the proposed wage decreases could not occur without the Union's agreement to eliminate the fixed contribution rate. The Union did not agree to this. Waggoner mentioned the Union's concern regarding Triangle Rock.[29] The meeting ended, and Waggoner stated that he could not negotiate with a "goddamned ghost," a reference to the Union's perception that the Respondent did not have the authority to negotiate over the pension plan.

On February 9, Dickerson sent the Union a letter (portions of which are quoted above) in which he provided the Union with additional wage information regarding four other nonunion competitors.[30] In this letter, Dickerson also stated that the Respondent agreed to the Union's proposal to change the base hours from 120 to 173 when calculating wage reductions for health and welfare premiums in excess of the caps. Dickerson urged the Union to come to the next meeting prepared to make any movement it desired to make regarding any proposals. In relevant part, the letter states:

> [F]or the record, Triangle Rock Irvine Lake (provided the deal goes through) is not a direct competitor to CalMat with its market in Orange County. Therefore, what they pay is irrelevant. Even so, they are planning to offer a wage and benefit package which is less costly than what we have proposed. [Regarding the association pension plan], CalMat has been and continues to be willing to negotiate on a coordinated basis with certain other companies, but it was you, Mr. Waggoner, who has refused to negotiate with more than one company at a time. In fact, you were the one responsible for destroying the industry's multi-employer bargaining arrangement in August, 1989, breaking up a forty (40) year bargaining history. In 1989 the parties had no trouble reaching accord on pension. And again in 1991, no problems were encountered and you never raised the issue once. But now, after two contract negotiations and seven months into the third, you suddenly are concerned that we cannot bargain on the issue of pension without a letter of authorization?

The ninth bargaining meeting between the parties occurred on February 13. At this meeting, Waggoner presented Dickerson with a letter written in response to Dickerson's letter of February 9. A portion of Waggoner's letter has been quoted above. In this letter, Waggoner renewed his request for financial information, and asked for more information about Triangle Rock. Regarding the pension plan, Waggoner wrote:

> [O]ur comments [about the pension plan] at the February 2, 1995, session were caused by the recent history of our efforts to amend the plan. On October 22, 1993, as a result of the pension reopener, Local 12 received a letter signed by yourself, John Gresock and John Clemente indicating agreement to propose that the Association Pension and Insurance Committee increase pension credits from $37.00 to $38.00 effective November 1, 1993. This proposal was never ratified by the Plan and never went into effect. Other negotiations were also unsuccessful in adjusting pension credits. Then, your own accountant reported that the plan was in danger of becoming overfunded again, but you stalled on negotiating a resolution of this problem and no resolution has yet

[28] See discussion, above.

[29] Waggoner was essentially concerned that the Respondent, which operated Triangle Rock as a nonunion subsidiary, would acquire and operate another facility through Triangle Rock as a nonunion enterprise.

[30] See sec. I, above.

> been reached. As of now, this issue is in litigation. A big part of the problem is the Association's rules, requiring any change to be approved by two-thirds of the employers who employ three-fourths of the employees in the plan. You yourself admitted that CalMat has the votes to block any change to the plan of which you do not approve. That is why we are so concerned about the status of negotiations concerning the pension plan.

Waggoner concluded by expressing his desire to reach a mutually acceptable agreement, but noted that numerous problems remained.

During the meeting, Waggoner orally reiterated the Union's request for financial information from the Respondent. Waggoner asked Dickerson who the Respondent's competitors were, and Dickerson responded that Owl Rock was the Respondent's main nonunion competitor. Dickerson added that the Respondent had supplied the Union with all the information it could with respect to Owl Rock's wage rates. The Union presented a written proposal containing a small change regarding criteria affecting employees' eligibility for 2 and 3 weeks' of vacation. The Respondent made a verbal proposal to add back 25 cents to its proposed wage reductions in the first year of the agreement's term. (In all, the Respondent had added back a total of $1.60 to its original wage reduction proposal, which contained reductions in the various employee classifications' hourly wage rates. The Respondent's original proposal contained wage reductions ranging from $2.15–$8.04 per hour.) The Respondent stated that this was its bottom line offer regarding wages, and Dickerson asked Waggoner to take this proposal to the Union's membership for a vote. The Respondent also stated that it would agree to 173 (from 120) hours per month as the base for calculating reductions in the health and welfare premiums in excess of the cap.

Significantly, at this point in the negotiations, Waggoner stated that unless the Respondent took its proposal to eliminate the fixed contribution rate off the table, there would be no movement on any other issue. The Union did not modify its opposition to the Respondent's pension proposal in any respect.

On February 16, the Respondent transmitted its "last, best, and final offer" to the Union. Regarding the pension issue, Dickerson wrote: "The parties are at irreconcilable odds concerning the fundamental structure of the plan. The Company insists upon a defined benefit plan only, while the Union is insisting on a combined defined contribution and defined benefit plan. You have stated that you will not change your position on this *fundamental* issue." (Emphasis added.) Dickerson concluded this letter by stating that "we are at impasse," and that the Respondent intended to implement its last, best, and final offer as to wages, health and welfare benefits, and overtime pay on February 27. The Respondent actually did not implement any of its proposals until March 6, because the Union requested another meeting, and the Respondent delayed its implementation so the parties could meet one more time.

On February 28 Waggoner responded, in a letter to Dickerson's letter of February 16. Waggoner stated that he was unable to accept Dickerson's statement that the Respondent would implement its last, best, and final proposals unless the Union accepted the major economic issues as a package. Waggoner requested Dickerson to retract this statement, and added that unless Dickerson did so, the Union would not be present at the bargaining session scheduled for March 3. On March 1 Dickerson wrote back. He reaffirmed the Respondent's intent to be present at the March 3 meeting, and did not retract anything contained in the February 16 letter.

On March 2 Waggoner sent a letter to the Respondent's president/chief executive officer, A. Frederick Gerstell. Waggoner emphasized that the Union had had a generally productive bargaining relationship for many years with the Respondent, and that the Respondent's excessive proposals jeopardized this relationship.

The final bargaining meeting occurred on March 3. Waggoner stated that the only reason he was present was to prevent the Respondent from using his absence against him with the Union's membership. Neither side delivered a written proposal. The Union did not make any oral proposal relating to wages, overtime, or vacation. However, the Union orally agreed to four holidays (a reduction from the eight holidays contained in the expired agreement), and stated that it would agree to Respondent's health and welfare proposal, if the Respondent paid the full cost of retiree coverage. Dickerson asked for a cost estimate, but Waggoner responded that he did not have one. Dickerson asked Waggoner if he had any further movement to report, to which Waggoner replied, "[N]ot unless you get off your . . . damn pension plan." Dickerson stated that the Respondent would not modify its proposal to eliminate the fixed contribution rate. Then, Waggoner stated that, "[I]t looks like we are hung up on that." Dickerson agreed, stating, "[W]e are hung up on that." Waggoner testified that he told Dickerson that if the parties could resolve the pension issue, then an overall agreement would be likely. The parties had discussed the pension plan, but the Union did not make a proposal regarding this bargaining issue. Waggoner asked if Dickerson could guarantee the pension benefit levels, to which Dickerson replied, "[W]e guarantee it." A union negotiator asked if the Respondent could obtain a letter from the PIC guaranteeing the benefit levels; Dickerson asked if such a letter would enable the Union to agree to Respondent's proposal to remove the fixed contribution rate. The union negotiator replied, "[N]o." The Union also suggested instituting a jointly administered pension plan, an idea that the Respondent had previously rejected, and continued to do so.

Toward the conclusion of the meeting, Waggoner raised the possibility of the Respondent meeting with the other employers participating in the pension plan to discuss the pension. Dickerson stated that he did not discuss "what if" scenarios, and urged Waggoner to make a proposal if, in fact, he had any proposals to make. Dickerson added that such a meeting would be pointless unless the Union would agree to eliminate the fixed contribution rate. Thus, the meeting concluded. Ultimately, the parties would meet again on May 30 to discuss the pension plan. On March 6, the Respondent implemented the wages and health and welfare benefits proposals contained in its last, best, and final offer of February 16.

In March 1995 the PIC retained an attorney named James Bowles to negotiate with the Union on behalf of the plan's participating employers with respect to the pension plan only. Bowles testified without contradiction that his chief objective was to eliminate the plan's exposure to lawsuits by eliminating the fixed contribution rate and replacing it with an actuarially determined variable rate. On March 13 Bowles asked to meet with the Union. Between March 13 and May 20 Bowles and Waggoner exchanged a series of letters regarding the potential meeting(s), and who, among the participating employers, would get to participate.

The record reflects that the following events leading up to the May 30 meeting occurred. Waggoner accepted Bowles' invitation to bargain with a group of participating employers on the pension issue only. Waggoner also stated, in a letter, that unless the Respondent (and LG/BD) rescinded their unilateral implementations, the Union would agree to "meet on a coordinated basis with the employers named in [Bowles'] letter except CalMat and [LG/BD]." Bowles responded, in a letter, that the Union should reconsider its position with respect to excluding the Respondent from the meeting, because such a position could be construed as bad-faith bargaining. Waggoner responded, in a letter, that the Union was not refusing to bargain in good faith, and the Union continued to insist that the Respondent and LG/BD be barred from the meeting. The issue regarding which employers Bowles would represent was not definitively resolved until the meeting.

The meeting between Bowles and the Union occurred on May 30. Bowles and John Gresock represented the PIC. Waggoner appeared for the Union, and opened the meeting by stating that the PIC wanted to "screw the working man." Waggoner also expressed surprise that Bowles and Gresock were the only individuals appearing on behalf of the PIC. Bowles then identified each of the employers he was representing at the meeting. The list included the Respondent. Bowles noted that he had full authority from the PIC to bargain on behalf of these employers, and that the number of employers he represented was sufficient to satisfy the two-thirds, three-fourths rule required under the 18th amendment to the pension plan.[31] The judge implicitly credited Bowles' testimony that Waggoner did not object to the Respondent's participation, after Bowles stated that he was representing the Respondent, among others.

Waggoner asked what the employers' bottom line was. Bowles responded that the employers wanted to eliminate the fixed contribution rate to avoid future lawsuits. If the Union would agree to this, Bowles said, the employers could also negotiate benefit levels with the Union. Waggoner rejected this proposal and stated that he was content with the way things were under the expired agreement; specifically, he stated that the Union liked a system under which it could "sue you guys every couple of years and change benefit levels that way." Bowles then suggested a "covenant not to sue" and told Waggoner that if the Union would agree to this, the Respondent might be able to modify its proposal to eliminate the fixed contribution rate.[32] Waggoner did not follow up on Bowles' suggestion. Instead, Waggoner stated that the Union wanted to retain the fixed contribution rate and increase the benefit level by $2 each year for the next 5 years. Bowles noted that this proposal was worse than the Union's previous proposals and was, therefore, unacceptable. Waggoner stated that the Union's proposals would get even worse, because he was tired of "you guys" asking for concessions all the time. Bowles asked who Waggoner was referring to when he said, "[Y]ou guys"; Waggoner replied that he was referring to the Respondent and LG/BD. Bowles then asked Waggoner why all participating employers should be penalized as a result of the Union's dispute with the Respondent; Waggoner replied, in effect, that that was where things stood, and that Bowles should get used to it. Bowles then asked Waggoner if the parties were at impasse. Waggoner responded: "you can take your proposal and stick [the proposal] up you're a—." With that, Waggoner left the meeting room, and the session concluded.

On June 2, Bowles sent Waggoner a letter describing his view of the events of May 30. In his letter, Bowles stated that he had represented the Respondent at the May 30 meeting. Waggoner responded by letter dated June 7. In this letter, Waggoner did not disavow Bowles' statement that the Respondent was a participant in the May 30 meeting,[33] thus effectively acquiescing in Bowles' position that he represented the Respondent. Therefore,

[31] See discussion, above.

[32] In his uncontradicted testimony, Bowles characterized the "covenant not to sue" idea as a suggestion, not as a proposal. He also testified, without contradiction, that the Union was not amenable to this suggestion, and that the Respondent remained firm in its proposal to eliminate the fixed contribution rate.

[33] In fact, as the judge found, the Respondent and LG/BD were necessary participants in the May 30 meeting, because without them, the requisite numbers of employers required to approve amendments to the pension plan under the 18th amendment to the pension plan would not have been present.

it is clear that the Respondent was, in fact, represented by Bowles at this proceeding. Bowles offered to meet with the Union before the Respondent (and other employers represented by Bowles) implemented its pension proposal. The Union did not follow up on Bowles' invitation to meet.

The Respondent implemented its proposal to eliminate the fixed contribution rate from the pension plan on July 1. Approximately 3 weeks later, bargaining unit employees went on strike. On August 21 the Respondent implemented its proposals in the remaining areas that had been the subject of the negotiations.

As discussed above, the judge concluded, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with certain information requested by the Union. The judge concluded that the Respondent's alleged failure to supply the Union with the requested information constituted a serious unfair labor practice, which precluded any impasse. Thus, the judge found that the Respondent further violated Section 8(a)(5) and (1) by implementing changes in its employees' terms and conditions of employment on or about March 6, July 1, and August 21, at which times, according to the judge, no valid impasse existed. The judge also concluded that the strike commencing on July 26 was an unfair labor practice strike and the striking employees are, therefore, unfair labor practice strikers.

We first address the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with information requested by the Union. Because we reverse the judge's conclusion that the Respondent violated the Act in this regard, we next address whether a valid bargaining impasse existed at the time the Respondent implemented changes in employees' terms and conditions of employment.[34]

III. ANALYSIS

A. Legal Framework and Conclusions Relating to the Union's Information Requests

1. Legal Framework

Under Section 8(a)(5) and (d) of the Act, as interpreted by the Supreme Court, an employer is obligated to furnish a union with sufficient relevant information, on request, to enable the union to represent its employees effectively in collective-bargaining negotiations.[35] Further, an employer's failure to furnish a union with such information may preclude a good-faith bargaining impasse.[36]

The standard governing an employer's obligation to produce relevant information is akin to a liberal "discovery-type standard."[37] Information concerning employees within the bargaining unit is presumptively relevant.[38] But,

> [w]hen a union's request for information concerns data about employees or operations other than those represented by the union, *or data on financial, sales, and other information*, there is no presumption that the information is necessary and relevant to the union's representation of employees. Rather, the union is under the burden to establish the relevance of such information. [Emphasis.][39]

The "broad, discovery-type standard in determining relevance in information requests" also applies to requests, such as the requests at issue, in "which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information."[40] After the Union has demonstrated that its information request relates to relevant information, "the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information."[41]

2. Conclusions

The judge concluded, first, that the Respondent did not fulfill its obligation to provide the Union with relevant information, and, second, that the Respondent's failure to do so constituted a serious, unremedied unfair labor practice that precluded a good-faith bargaining impasse.

We have quoted the relevant portions of the Union's information requests above.[42] Throughout the course of the negotiations, the Respondent maintained that it was seeking reductions between 14–20 percent to be competitive with wages and benefits paid by its nonunion competitors, and that its chief competitor in this regard was Owl Rock. The Respondent's primary concern involved the lower wages paid by Owl Rock. The Union's information requests were not restricted to information about Owl Rock, however. In brief, the Union asked for all documents in the Respondent's possession with respect to the Respondent's competitors' locations, jobs "taken" from the Respondent, productivity, labor and

[34] The judge did not address whether a valid bargaining impasse existed at the time the Respondent implemented changes in employees' terms and conditions of employment.

[35] See *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967).

[36] See *United Stockyards Corp*., 293 NLRB 1 (1989), enfd. 901 F.2d 669 (8th Cir. 1990).

[37] *NLRB v. Acme Industrial Co*., 385 U.S. at 437.

[38] *NLRB v. Postal Service*, 888 F.2d 1568, 1570 (11th Cir. 1989) (citing *NLRB v. Rockwell-Standard Corp*., 410 F.2d 953 (6th Cir. 1969)).

[39] *Bohemia, Inc.,* 272 NLRB 1128, 1129 (1984). See also *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

[40] *Shoppers Food Warehouse*, supra, 315 NLRB at 259, and cases cited therein.

[41] *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

[42] The Union submitted its first written information request to the Respondent on January 16, approximately 5 months after the first bargaining session.

material cost, prices, profits, and losses. The Union also requested information about Triangle Rock. Further, in a letter responding to Dickerson's answers to the Union's information requests, Waggoner expressed dissatisfaction with Dickerson's response, and repeated and expanded upon his information requests.

In a letter dated January 19, the Respondent supplied the Union with information relating to the Respondent's chief nonunion competitor, Owl Rock. Specifically, in this letter, Dickerson supplied the Union with the wage rates for various classifications.[43] In this letter, Dickerson noted that, "other unionized competitors are seeking substantial reductions in wages and benefits in their negotiations." The Respondent did not furnish the other items listed in the Union's information request involving competitors' labor and material costs, profits and losses, and productivity. Dickerson testified that the Respondent did not possess studies or analyses, and had no information concerning its competitors' productivity, labor and material costs, prices, or profitability. After Waggoner commented at the February 2 meeting that the Respondent had not adequately supplied the Union with necessary information, Dickerson, in a letter dated February 9[44] stated the following with respect to smaller, nonunion competitors:

> We have provided you with information concerning Owl Rock Products' rates of pay both at the bargaining table and in our letter of January 19, 1995. As you are no doubt aware, there are numerous other companies paying substantially less in wages and benefits than CalMat currently is. Examples include P.W. Gillibrand in Simi Valley who is paying from $12.00 to $16.00 per hour for operators. Quality Rock in Moorpark pays $7.00 per hour for "unskilled" up to $13.00 for "skilled" personnel. Channel & Basin [R]eclamation, Inc. pays, on average from $12.00 to $14.00 per hour for its workers, with a $10.00 per hour top rate for Conveyorman. Empire Rock in Alta Loma pays its Repairman up to $20.00 per hour with Operators in the $18.00 to $20.00 range. Additionally, these companies, overall pay less in benefits than CalMat is proposing. . . . Again, for the record, Triangle Rock, Irvine Lake (provided the deal goes through) is not a direct competitor to CalMat with its market in Orange County. Therefore, what they pay is irrelevant. Even so, they are planning to offer a wage and benefit package which is less costly than what we have proposed.

In its February 13 letter, the Union requested the locations of all of the Respondent's "so-called" competitors, how many operating engineers they employed, the prices they were charging, and how many jobs they had taken from the Respondent. Regarding its request for the locations of the Respondent's competitors, the Union had a previous bargaining relationship with Owl Rock and the location of Owl Rock had not changed since 1989.

Additionally, in the above-quoted correspondence, the Respondent included the locations of its smaller, nonunion competitors. Dickerson testified that he did not know the amount of jobs these smaller, nonunion competitors had taken from the Respondent, and that he did not know how many operating engineers they employed.[45]

Thus, the Respondent provided the Union with all of the information it had that was encompassed by the Union's requests that are at issue in this case. The Respondent was not required to provide the Union with information that it did not have. First, the Union only requested information in the Respondent's "possession and/or control." Uncontradicted evidence shows that the Respondent did not have "possession and/or control" of any of the information concerning its competitors requested by the Union. And, at least in the circumstances of this case, where the information concerned other companies not related to the Respondent, it had no obligation to attempt to obtain that information. The judge found that the Respondent would have to show that it made efforts

[43] With respect to wage rates, the Respondent supplied the Union with the following information:

Job	CalMat	Owl Rock	Difference
Conveyorman	$20.76	$15.50	$5.26
Skiploader Operator	21.07	18.50	2.57
Heavy Duty Repairman	21.38	20.50	0.88

[44] The judge inadvertently stated that the date of this letter was February 5. The correct date is February 9.

[45] Also in its February 13 letter, the Union asked the Respondent (a) who owned Triangle Rock, (b) when would the Respondent's negotiations to purchase the Triangle Rock operation at Irvine Lake be finalized, and (c) what would happen to Triangle Rock's employees if the Respondent purchased it. The complaint does not allege an unlawful refusal to provide the requested information about Triangle Rock and Irvine Lake. The judge, however, found a violation as to the failure to provide this information, and the Respondent has not excepted on the grounds that it was not alleged in the complaint. While we reject the Respondent's contention that what Triangle Rock would pay is irrelevant, we nonetheless reverse the judge because we find that the Respondent provided all the information it had.

In its posthearing brief to the judge, the Union stated that it knew that Triangle Rock was a wholly owned nonunion subsidiary of the Respondent, and that Blue Diamond was threatening to sell its Irvine Lake facility to the Respondent who, in turn, was threatening to operate the potentially acquired facility as a nonunion enterprise through Triangle Rock. In an earlier (February 9) letter to the Union, the Respondent said that Triangle Rock was planning to offer its employees a wage and benefit package that was "less costly than what we have proposed." In the Union's subsequent March 2 letter to the Respondent, it acknowledged that the Respondent had earlier advised it that the Respondent did not intend to extend the collective-bargaining agreement to Triangle Rock, but instead intended to operate Triangle Rock nonunion. On or about March 3, the Respondent told the Union that the negotiations to purchase Triangle Rock, Irvine Lake were not completed.

to obtain this information and was unable to do so. The cases cited by the judge in support of this proposition, however, are distinguishable, because they involved information concerning employees of employers with whom the respondents had some sort of relationship, contractual or otherwise, and thus they would arguably have the ability to obtain the requested information. *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 958 (6th Cir. 1969) (information concerning the employees of company which supplied clerical employees to the respondent); *United Graphics Inc.*, 281 NLRB 463 (1986) (information concerning employees supplied to respondent by temporary employment agency). See also *Congreso de Uniones Industriales de Puerto Rico v. NLRB*, 966 F.2d 36 (1st Cir. 1992) (respondent unlawfully failed to provide union with document possessed by respondent's parent company); *Arch of West Virginia*, 304 NLRB 1089 (1991) (respondent failed to request information from parent company and sister subsidiaries). Obviously, no such close, dependent relationship exists between the Respondent and its competitors in this case, so these cases do not impose on the Respondent the obligation to attempt to obtain the information requested by the Union.

Thus, we reverse the judge's conclusion that the Respondent unlawfully failed to supply the Union with information requested by the Union concerning its competitors, on the grounds that the information was neither in its possession or control. However, assuming that the Respondent did have within its possession or control information concerning such matters as its competitors' "productivity, labor and material cost, prices, profits and losses," we would find that the relevance of the information sought by the Union has been shown. Thus, the information was relevant and necessary to the Union's ability to evaluate and bargain with the Respondent over its claimed need for concessions in order to remain competitive. See *E. I. du Pont & Co.*, 276 NLRB 335 (1985) (in context of employer's expressed concern over market competitiveness, it unlawfully refused to provide union with information relevant to bargaining over employer's job restructuring proposal, including *known* comparative per unit costs at other plants operated by both employer and competitors). In the absence of any other basis for not providing the requested information to the Union, such as asserted confidentiality interests that outweighed the Union's need for the information (see *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979)), the Respondent would be required to provide the requested information to the Union.

The Respondent disputed the information's relevance, asserting that it was basing its proposals only on the wages and benefits of its nonunion competitors, and thus information concerning other aspects of their business was not relevant to its bargaining proposals. Where, as here, an employer relies upon its alleged noncompetitiveness with nonunion employers, information concerning the nonunion employers is clearly relevant. This information is not limited to the wages and benefits paid by the nonunion employers. The wage benefit information does not exist in a vacuum. For example, when faced with a demand for concessions in wages and benefits based on a need for competitiveness, the Union could reasonably conclude that information concerning the competitors' wages and benefits alone would not be sufficient to evaluate the Respondent's need for concessions. A more complete economic analysis of the competitors' performance could help the Union to better understand and assess, not only the wage and benefit proposal, but also the competitors' rate structure and why it might differ from that of the Respondent. Data on competitors' productivity, prices, and labor and material costs, as sought by the Union here, would be relevant to this analysis. With such information, the Union might be able to generate alternatives to wage and benefit concessions through which the Respondent could become more competitive, such as by increasing productivity or reducing costs in other areas. In addition, the Union might need such information, as well as information concerning the job classifications employed by the other companies and the jobs they have taken away from the Respondent, to evaluate whether or not those companies are truly in the same competitive market as the Respondent.

Therefore, as stated, if the Respondent had actually possessed the information sought by the Union, we would find that it was relevant and necessary to the Union's collective-bargaining responsibilities. However, because the Respondent has credibly asserted that it did not have the information in its possession or control, we find that its failure to provide it to the Union was not an unfair labor practice.

B. Legal Framework and Conclusions Relating to Impasse

1. Legal framework

We have reversed the judge's finding that the Respondent violated Section 8(a)(5) by failing and refusing to provide the Union with information relevant and necessary to its collective-bargaining responsibilities. Accordingly, the judge's conclusion that no bargaining impasse existed due to the effect of serious unremedied unfair labor practices which affected the bargaining, i.e., the failure to provide the Union with information, can no longer stand. We must therefore analyze whether the Respondent has met its burden of proving that an impasse existed which justified its unilateral implementation of its "last, best and final offer" beginning on March 6.

Under Section 8(d) of the Act, an employer and a union are mutually obligated "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but

such obligation does not compel either party to agree on a proposal or require the making of a concession."[46] Under Section 8(a)(5) of the Act, "[I]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." Thus, according to well-established law, "[a]n employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment."[47] However, "after bargaining to an impasse . . . an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals."[48] Parties need not reach impasse on all bargaining issues before an employer may lawfully implement its bargaining proposals. A single issue (such as the critical pension negotiations before us here) may be of such overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues:

> The Board has long distinguished between an impasse on a single issue that would not ordinarily suspend the duty to bargain on other issues and the situation in which impasse on a single critical issue creates a complete breakdown in the entire negotiations. Only in the latter context where there has been a complete breakdown in the entire negotiations, is the employer free to implement its last, best, and final offer.[49]

Thus, a party that maintains that an impasse on a single, critical issue justified its implementing all of its bargaining proposals must demonstrate three things: first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

In establishing that the bargaining parties have reached impasse, the burden of proof lies with the party asserting that an impasse exists.[50] Determining whether a bargaining impasse exists involves a fact-intensive analysis, guided by various factors:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.[51]

2. Conclusions

The record reflects that the negotiations regarding the pension plan played the critical role in the bargaining, and that the parties' failure to agree on this issue destroyed any opportunity for reaching a successor collective-bargaining agreement. From the first meeting on August 22, 1994, until March 3, the Respondent insisted that it had to eliminate the fixed contribution rate in order to avoid future lawsuits. The Respondent never wavered from its position. The Union, too, was equally adamant in its position that the fixed contribution rate could not be eliminated. All other bargaining occurred in the shadow of this fundamental disagreement.

The parties' bargaining behavior demonstrates the vital role proposals relating to the pension plan played in these negotiations. First, throughout the negotiations, the parties differed as to how to interpret the 18th amendment to the pension plan[52]—the Union saw it as a vehicle to increasing its participation in the pension plan, while the Respondent argued that it did not constrain participat-

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[46] The parties stipulated that the unilateral changes at issue involved mandatory subjects of bargaining. Significantly, the Board has long held that an employer's pension plan is considered a mandatory subject of collective bargaining. See, e.g., *Inland Steel Co*., 77 NLRB 1 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949).

[47] *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[48] *Taft Broadcasting Co*., supra at 478. See also *Colorado-Ute Electric Assn*., 295 NLRB 607, 609 (1989), enf. denied on other grounds 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992), in which the Board stated the rationale underlying the rule permitting implementations following impasse:

> That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a duty to agree to the union's counterproposals or to make a concession. . . . The employer's duty to bargain does not give the union a right to veto the proposed changes by withholding consent. If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations.

[49] *Sacramento Union*, 291 NLRB 552, 554 (1988), enfd. mem sub nom. *Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989), and cases cited therein. See also *NLRB v. Tomco Communications, Inc*., 567 F.2d 871, 881 (9th Cir. 1978): "Those who bargain collectively are normally under an obligation to continue negotiating to impasse on all mandatory issues. The law relieves them of that duty, however, when a single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement."

[50] See, e.g., *PRC Recording*, 280 NLRB 615, 635 (1986), enfd. sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987).

[51] *Taft Broadcasting Co*., supra, 163 NLRB at 478. Furthermore, as is arguably true of the bargaining history in this case (namely, the May 30 meeting between the PIC attorney and the Union that occurred after the Respondent implemented its wage and health and welfare benefits proposal), "some bargaining may go on even in the presence of deadlock." *AFTRA v. NLRB*, 395 F.2d at 628.

[52] As discussed in sec. I, the 18th amendment to the pension plan was the result of a Federal district court-approved settlement in 1991. Stated briefly, the 18th amendment to the pension plan concerns methods of amending and funding the plan.

ing employers' ability to negotiate changes to the contribution rate. This was a fundamental disagreement. The record reflects that, throughout the negotiations, the Union questioned whether the Respondent possessed the legal authority to bargain over the pension issue. In this respect, at the bargaining session of February 2, Waggoner left the meeting announcing that the Respondent lacked the authority to bargain over the pension plan and that he could not negotiate with a "ghost." The Respondent, however, adamantly maintained that it possessed the requisite authority to negotiate over the pension plan.[53]

Second, the parties' words demonstrate the importance of the pension plan. On October 31, Dickerson, in a letter to Waggoner, stated that the fixed contribution rate had to be eliminated to bar future lawsuits affecting the plan, and emphasized that the fixed contribution rate "simply cannot continue." On February 16, in a letter to Waggoner, Dickerson stated that the parties were at impasse. He referred to the pension plan issue as "fundamental," and stated that the Union had expressed its unwillingness to modify its position on this issue. He further noted that the parties were at "irreconcilable odds" on the pension plan. Statements made by Dickerson and Waggoner at the March 3 meeting also demonstrates the importance of the pension plan issue. Waggoner stated that he was only appearing at the meeting so that the Respondent could not hold his absence against him with the Union's members. After some ultimately futile discussion regarding benefit levels and the possibility of coordinated bargaining on the pension issue, Dickerson asked Waggoner if the Union had any movement to report, to which Waggoner replied, in effect, not unless the Respondent changes its pension proposal. Dickerson said that the Respondent could not do this. The parties then expressed their mutual view that they were "hung up" on the pension issue. (Waggoner also stated that, if the parties could agree on the pension issue, an overall agreement might be possible.) The Respondent carried out its first implementation—affecting wages and health and welfare benefits—on March 6.

Statements made by Bowles and union negotiators at the May 30 meeting further demonstrate the unyielding nature of the parties' attitudes toward the pension issue. As stated above, this meeting addressed only the pension issue, therefore highlighting the significance of the pension issue. Bowles reaffirmed the participating employers' desire to eliminate the fixed contribution rate. Waggoner, in turn, responded that the Union liked the plan the way it was, and that the Union was content with a system which enabled it to sue the PIC to raise benefit levels. Bowles suggested a covenant not to sue, but Waggoner did not agree to this.[54] Next, Waggoner outright rejected Bowles' proposal to eliminate the fixed contribution rate. With that, the meeting ended.

In sum, the pension plan issue pervaded the negotiations. From the start, the Respondent stressed the significance of this issue. The Union equally stressed its desire to continue the fixed contribution rate. These positions never changed. The record reflects that the Respondent modified several of its proposals relating to, inter alia, reductions in wages and caps on health and welfare contributions. The Union's only bargaining concessions came in the comparatively minor areas of holidays and vacations. Ultimately, it was the parties' fundamental disagreement on the pension plan issue that led the Respondent to declare impasse.

As applied to the bargaining in this case, the *Taft* factors demonstrate that the parties reached a good-faith bargaining impasse regarding the pension plan on March 6.[55]

The first factor is the parties' bargaining history. The parties had a lengthy bargaining history (dating back approximately 40 years). Waggoner stated, in a letter to the Respondent's president/chief executive officer, that although the parties had had some disagreements over the years, the bargaining relationship had always culminated in the parties reaching agreements. Thus, the parties had a successful history of bargaining. However, the record reflects that the bargaining relationship began to sour as a result of the Union's lawsuits against the pension plan. The bargaining history of the instant negotiations demonstrates that the parties could not reach agreement.

Regarding the good faith of the parties during bargaining, both parties "have a duty to negotiate with a 'sincere purpose to find a basis of agreement,'" but "an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith."[56] Upon scrutinizing both parties' overall conduct during these negotiations, we conclude that neither party refused to bargain in good faith: the parties met frequently and, while the bargaining may have been difficult, both parties exchanged proposals over the course of the negotiations.[57]

[53] The General Counsel did not issue a complaint alleging that the Respondent did not have the authority to negotiate over the pension, and the Office of Appeals sustained this conclusion. See discussion, above, regarding the Federal courts' comments on participating employers' legal prerogative to bargain over the contribution rate contained in collective-bargaining agreements. We find it unnecessary to interpret the legal requirements contained in the 18th amendment to the pension plan.

[54] See fn. 32, supra.

[55] Because we conclude that the parties reached impasse on the critical issue of the pension plan, it is unnecessary for us to determine whether the parties also reached impasse on the other areas of bargaining.

[56] *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting in part *NLRB v. Herman Sausage Co*., 275 F.2d 229, 231 (5th Cir. 1960)).

[57] We also note that the General Counsel did not issue complaints against either the Respondent or the Union after each party charged the other with bad-faith bargaining. The Union additionally alleged

The negotiations spanned approximately 7 months and included 10 bargaining sessions through March 3. The parties discussed the pension issue at every meeting and in a series of letters. Over the course of the negotiations, neither party modified its position on this issue. The Board does not rely on a set formula for determining whether negotiations have gone on for an excessively longtime or whether, alternatively, there have been too few bargaining meetings. Indeed, the Board has found bargaining impasses after a period of time shorter than 7 months.[58] Significantly, Waggoner met Bowles for a bargaining meeting solely related to the pension issue on May 30, after the Respondent's declaration of impasse. As described above, no progress occurred at this meeting, which took place 10 months after the Union notified the Respondent of its intention to negotiate a new agreement.

In sum, over a 7-month period, in meeting after meeting, and in letter after letter, the parties evinced no desire to modify their positions on the critical pension issue. Although conduct such as "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings" may indicate a lack of good faith, none of these indicia is present here.[59]

The third factor is the importance of the issue. We have previously described how the pension plan issue came to play a critical role in these negotiations. We note, too, that the judge found that the pension issue played a "paramount" role in the negotiations.

Finally, we turn to the contemporaneous understanding of the parties. On March 3, Waggoner stated that the Union was not going to make any further proposals "unless [the Respondent] got off its . . . damn pension proposal." Dickerson said that this was not possible; Waggoner replied that the parties were "hung up on that," and Dickerson concurred. Waggoner expressed a similar sentiment at the conclusion of the May 30 meeting. The Respondent, of course, declared impasse on February 16.

The Union and the General Counsel contend that the Respondent prematurely declared impasse because, at the March 3 meeting (3 days before the Respondent implemented its wage and health and welfare proposals), Waggoner suggested coordinated bargaining on the pension issue. However, when Dickerson asked if Waggoner was making a proposal, Waggoner replied that he was not. Waggoner did not, during this meeting, suggest that the Union was willing to accept the Respondent's proposal to eliminate the fixed contribution rate. Moreover, after declaring impasse, the Respondent did engage in the coordinated bargaining that the Union suggested, to no effect.[60] It is undisputed that Bowles represented PIC employers during the May 30 coordinated bargaining session. And, although the Union contends that Bowles was not representing the Respondent at this meeting, the record reflects that Waggoner did not repudiate Bowles' statements during the meeting and after the meeting that he was representing the Respondent. Therefore, some form of coordinated bargaining did occur on May 30. As detailed above, the meeting was unproductive, and concluded on a harsh note. The record reflects that Dickerson was skeptical as to whether anything could be achieved in this bargaining session, but that, because the Respondent wanted an agreement, he agreed to one more attempt.[61] We find that the parties reached impasse no later than March 3, regardless of the post-impasse bargaining occurring on May 30.

The Respondent notified the Union on February 16 that it intended to implement its wage proposal and its health and welfare benefit proposal on February 27, but remained willing to meet with the Union to discuss all

that the Respondent lacked the legal authority to bargain over the pension issue, but the General Counsel did not issue a complaint on this matter.

[58] See, e.g., *Prentice-Hall, Inc*., 306 NLRB 31, 40–41 (1992) (good-faith impasse found after eight bargaining sessions over 5 months); *Concrete Pipe & Products Corp*., 305 NLRB 152, 153 (1991), affd. sub nom. *Steelworkers Local 14534 v. NLRB*, 983 F.2d 240 (D.C. Cir. 1993) (good-faith impasse found after four bargaining meetings).

[59] *Atlanta Hilton & Tower*, supra, 271 NLRB at 1603 (fns. omitted). As we conclude below, the Respondent's unilateral implementations at issue were lawful.

Moreover, the commission of independent unfair labor practices during the negotiations and the parties' conduct away from the bargaining table may be evidence of bad-faith bargaining. See, e.g., *Coal Age Service Corp*., 312 NLRB 572, 580 (1993) (referring to contemporaneous unfair labor practices as evidence of bad-faith bargaining), and *Overnite Transportation Co*., 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991) (in determining whether a party has bargained in good faith, the Board examines, inter alia, a party's conduct away from the bargaining table). As stated above, the parties' appearances at numerous meetings during which they exchanged and discussed various proposals is indicative of good-faith bargaining. Further, neither party alleged, and the record contains no evidence of, the existence of contemporaneous unfair labor practices or nonbargaining misconduct.

[60] As stated above, the fact that the Respondent declared impasse did not preclude the parties from continuing to bargain, for "some bargaining may go on even in the presence of deadlock." *AFTRA v. NLRB*, supra, 395 F.2d at 628.

[61] Insofar as the General Counsel and the Union contend that Waggoner's suggestion regarding coordinated bargaining precluded a good-faith impasse, we note the following. In *Holiday Inn Downtown-New Haven*, 300 NLRB 774, 775 (1990), the Board stated that "[a] party's bare assertions of flexibility on open issues and its generalized promises of new proposals [do not clearly establish] any change much less a substantial change." See also *AFTRA v. NLRB*, supra, 395 F.2d at 628. *Financial Institution Employees, Local 1182 v. NLRB*, 738 F.2d 1038, 1042–1043 (9th Cir. 1984) (impasse occurred after the union rejected the employer's final offer, notwithstanding the fact that negotiations continued on some issues for several months).

We therefore reject the Union's argument that Waggoner's suggestion and the May 30 meeting demonstrate that the parties had not reached impasse on the pension issue.

bargaining issues. The Union asked to reschedule a prospective meeting date from February 23 to March 3. The Respondent therefore agreed to delay its first implementation until March 6.

We find that the Respondent's last, best, and final offer was reasonably comprehended by its bargaining proposals over the course of these negotiations.[62] Regarding the pension plan proposal, which was implemented on July 1, the Respondent changed its fixed contribution rate of $3.35 to a variable rate of $2.55. This implementation was reasonably comprehended by the Respondent's pension plan proposal made throughout the course of the bargaining. The Respondent's other implementations were also reasonably comprehended by its bargaining proposals—the Respondent sought reductions in wages and its cap on health and welfare contributions, and the last, best, and final offer is consistent with its proposed reductions.

In sum, we reverse the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to respond adequately to the Union's information requests. We also reverse the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully implementing changes in employees' terms and conditions of employment on or about March 6, July 1, and August 21, at which times no valid bargaining impasse existed. In light of the above reversals, we also reverse the judge's conclusion that the ensuing strike was an unfair labor practice strike, rather than an economic strike. Thus, we reverse the judge's conclusion that the striking employees are unfair labor practice strikers.

ORDER

The complaint is dismissed in its entirety.

MEMBER BRAME, concurring.

I concur with my colleagues in finding that the Respondent did not violate Section 8(a)(5) and (1) by failing and refusing to provide the Union with informaiton relating to nonunion competitors because uncontradicted evidence shows that the Respondent did not have "possession and/or control" of any of the information concerning competitors' productivity, labor and material cost, prices, profits and losses, number of operating engineers employed, and the number of jobs taken from the Respondent. See *Detroit Newspapers*, 326 NLRB 700, 727 (2000), revd. in part 216 F.3d 109 (D.C. Cir. 2000) (Members Brame and Hurtgen dissenting in part). However, I disagree with my colleagues' statement that information concerning these items would, in the event the Respondent possessed such information, be relevant and necessary to the Union's ability to evaluate and bargain with the Respondent over its claimed need for concessions in order to remain competitive. Under Board law,

> When a union's request for information concerns data about employees or operations other than those represented by the union, or data on financial, sales, and other information, there is no presumption that the information is necessary and relevant to the union's representation of employees. Rather, the union is under the burden to establish the relevance of such information.

Bohemia, Inc., 272 NLRB 1128, 1129 (1984). Accord: *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867–868 (9th Cir. 1977); and *NLRB v. Leland Stanford Junior University*, 715 F.2d 473, 474 (9th Cir. 1983). Furthermore, an employer is not required to supply a union with information that the employer did not rely on in fashioning its bargaining proposals. See, e.g., *Southwestern Bell Telephone Co.*, 173 NLRB 172, 173 (1968) (in concluding that the information relating to the cost of subcontracting requested by the union in that case was not relevant, the Board noted that the employer did not claim that cost was a factor in its subcontracting decisions). See also *Southwestern Bell Telephone Co.*, 262 NLRB 928, 933 (1982).

In light of the fact that the Respondent did not rely on factors other than Owl Rock's wages and benefits in framing its bargaining proposals, the Union has not met its burden of demonstrating that information relating to the number of operating engineers employed by competitors, the number of jobs competitors' had taken from the Respondent, and competitors' productivity, labor and material cost, prices, profits, and losses was relevant. Additionally, because it did not rely on factors other than Owl Rock's wages and benefits in framing its bargaining proposals, the Union has not demonstrated that requested information relating to Triangle Rock was relevant.

The facts demonstrate that, after negotiating at numerous meetings and exchanging a flurry of correspondence, the parties were deadlocked on the critical issue involving the pension plan. Therefore, the Respondent's changes in employees' terms and conditions of employment were lawfully implemented. In my view, in analyzing impasse cases, the Board recognizes that "there need be no undue reluctance to find that an impasse existed." *E. I. du Pont & Co.*, 268 NLRB 1075, 1076 (1984). And, "[w]hile bargaining must be conducted in good faith, it need not continue in perpetuity." *Community General Hospital*, 303 NLRB 383, 385 (1991). In fact, an impasse "cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted." *E. I. du Pont & Co.*, 268 NLRB at 1076 (quoting *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), enf. denied 500 F.2d 181 (5th Cir. 1974)). Furthermore, bargaining efforts occurring after impasse should be encouraged and, thus, not viewed as evidence of lack of impasse.

[62] See *Taft Broadcasting Co*., supra, 163 NLRB at 478.

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David P. Koppelman, Esq. (Local 12, International Union of Operating Engineers), of Pasadena, California.
Florice Hoffman, Esq. (*Wohlner, Kaplan, Phillips, Young & Brash*), of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles, California, on September 25, 26, and October 28–31, 1996,[1] pursuant to a consolidated amended complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on August 15, 1996, and which is based upon charges filed by International Union of Operating Engineers, Local 12, AFL–CIO (the Union) on March 8 (Case 21–CA–30573) and on September 1 (Case 21–CA–31336). The complaint alleges that CalMat Co. (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

1. Whether Respondent's motion to strike certain portions of the consolidated amended complaint should be granted in whole or in part.

2. Whether Respondent, violated the Act by failing to supply the Union with certain requested information during negotiations.

3. Whether Respondent in violation of the Act, made certain unilateral changes in the terms and conditions of employment, which terms and conditions are mandatory subjects for the purposes of collective bargaining, without the agreement or consent of the Union, and at a time when the parties were not at impasse.

4. Whether Respondent's employees engaged in an unfair labor practices strike.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the Union and Respondent.[2]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation engaged in the business of processing and selling of rock, sand, gravel, and related products and has a facility located in Los Angeles, California. Respondent further admits that during the past year ending December 31, in the course and conduct of its business described above, it has purchased and received at its facility, goods or services valued in excess of $50,000 directly from points outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Union of Operating Engineers, Local 12, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Procedural Background

1. Corespondent settles

When hearing of this case began, a second Respondent, Livingston Graham/Blue Diamond Materials, A Division of Cornerstone C & M, Inc. (LG/BD), was charged by the Union in Cases 21–CA–30576 and 21–CA–31337 (formerly Case 31–CA–21501) with certain violations of the Act. During the first 2 days of hearing, both Respondents engaged in settlement negotiations with the Union while the hearing was in progress. Thereafter, because prospects for settlement looked promising, I acceded to the request of all parties to continue the case for a period while Respondents and the Charging Party continued their negotiations. On resumption of the case on October 28, 1996, I was informed that Livingston Graham/Blue Diamond Materials and the Union had arrived at a private non-Board settlement, subject to resolution of certain other matters, which apparently were eventually resolved. After the settled case was severed from the proceeding, Respondent CalMat continued to litigate the issues to conclusion.

2. Region's dismissal of certain charges filed by the Union

Before the hearing ended, Respondent offered certain documents to show that not all of the charges filed by the Union against Respondent and other employers in the same business were found by the Region to have merit (R. Exhs. 37, 38). The only fact from this group of documents and other similar documents in the record which need be mentioned is that the Union's charge against Respondent alleging bad-faith bargaining was dismissed by the Region as lacking in merit and the Union's appeal of the dismissal was not successful.[3] However, some of the dismissals by the Region are still under appeal by the Union with no results having been reported to me at this writing.

3. Respondent's motion to strike portions of consolidated complaint and amended notice of hearing

On or about September 17, 1996, Respondent filed its motion to strike (GC Exh. 1(ll) and on the same date Deputy Chief Administrative Law Judge Robbins issued an order to show cause why said motion should not be granted (GC Exh. 1(nn)). Subsequently both the General Counsel and the Union filed responses (GC Exhs. 1(pp), (qq)), and I indicated I would decide the issue in my posthearing decision along with all other issues in the case not otherwise resolved.

In its motion, Respondent recites the somewhat protracted precomplaint history of the Union's charges. The record reflects certain dismissals, appeals by the Union, and requests for advice by the Region. As a result, Respondent contends, it is faced with certain allegations in the consolidated amended

[1] All dates herein refer to 1995 unless otherwise indicated.

[2] In lieu of a brief, the General Counsel cited cases in her opening and closing arguments. In addition, she submitted a short letter dated December 10, 1996, with additional citations of cases and limited argument.

[3] Respondent too filed one or more charges against the Union. One of these charged the Union with unlawfully attempting to delay negotiations. All charges filed by Respondent were dismissed.

complaint outside the scope of the original charges. Based on the [alleged] oppressive nature of the entire process and the [alleged] unfair surprise in which Respondent is somehow ensnared, Respondent asks for certain relief:

(1) Dismissal with prejudice of the entire consolidated amended complaint; or in the alternative.

(2) Striking with prejudice of certain paragraphs of the consolidated amended complaint; to wit paragraphs 9(a) and (c), alleging unlawful unilateral changes in the terms and conditions of employment (wages and health and welfare benefits); and paragraphs 10(a) and (b) alleging an unfair labor practices strike.

First, I decline to dismiss the consolidated amended complaint on the grounds that Respondent has failed to demonstrate prejudice which would justify such an extreme remedy. Rather, I find that the administrative procedures discussed by Respondent have allowed Respondent to face hearing in a better position than it would otherwise have been in. Thus, many of the Union's theories have been found to be without merit, a decision which in some cases is yet to be finalized on appeal. Nor do I find any evidence that the General Counsel, either trial counsel, its investigating agents, or any of its officials in Appeals, Advice, or the Region acted in bad faith. Again, I find, to the contrary, that they acted in good faith, seeking with diligence, to protect Respondent's interests along with those of the Union's.

As to Respondent's alternative request, I will also deny the motion to strike the paragraphs mentioned above for the reasons that follow. Respondent's contention that the offending paragraphs mentioned above are either outside the scope of the Union's charges and/or untimely is not supported by the record of this case.

In paragraph 13 of its motion to strike, Respondent challenges paragraphs 9(a), (b), and (c) of the consolidated amended complaint; however in pararagraph 19, its final paragraph of the motion to strike, Respondent asks "as an absolute minimum" that paragraphs 9(a) and (c), and 10(a) and (b) of the consolidated amended complaint be struck with prejudice. Perhaps the omission of pararagraph 9(b) was inadvertent, perhaps deliberate; in the final analysis it doesn't matter.

Respondent cites no authority for the proposition that any allegation in a complaint different from, or in addition to that remanded by the Office of Appeals may be struck. I agree with the Union that the case of *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), should govern. In that case, the Court noted and affirmed the Board's broad investigatory power not at all confined to the precise particularization of the charge. Thus, while the letter of December 1, to Koppelman from the Office of Appeals (Exh. 4 to Respondent's motion) refers only to "the Employers' unilateral implementations of their wage proposals . . ., I find that the General Counsel was well within its authority to included health and welfare benefits and pension issues in the complaint. See *Redd-1, Inc.*, 290 NLRB 1115, 1118 (1988), and *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).[4]

At paragraph 15 of its motion to strike, Respondent avers that paragraph 9(b) of the complaint should be stricken because Respondent was never given the opportunity to submit evidence or authority regarding the General Counsel's legal theory. Respondent fails to explain how it was prejudiced by the alleged error of the General Counsel nor does it submit legal authority in support of the relief sought. I find that Respondent could have submitted argument and/or authority after it knew of the General Counsel's allegations in the complaint regarding unilateral change in the pension plan, or it could have requested postponement of the hearing on the grounds of inadequate time to research the issues. I note that even after the first 2 days of hearing, Respondent had about a month to do whatever legal research it felt was required. Respondent did none of this. Instead, in its answer, appended to the General Counsel's opposition, it admitted paragraphs 9(a), (b), and (c). Finally, Respondent has now submitted a posthearing brief containing arguments which will be duly considered. Again, I ask, where is the prejudice, I find none.

With respect to paragraphs 10(a) and (b) of the consolidated amended complaint, raising issues regarding the Union's strike activity, I again find that such issues are closely related to the Union's timely charge and well within the General Counsel's legal authority to include in the complaint. I note also, that within the context of the 6-day hearing, direct evidence regarding whether the Union is engaging in an unfair labor practice strike is minimal. I find that the issue is primarily, if not exclusively, a legal issue dependent on other related findings to be made in this decision.[5]

Finally, Respondent contends that paragraphs 9(c) and 10(a) and (b) of the consolidated amended complaint are time barred by Section 10(b) of the Act. I find this argument like the others, is without merit under the authority of *Redd-1, Inc.* and *Nickles Bakery of Indiana*, supra. The pension allegations involve the same section of the Act, Section 8(a)(5) as the other alleged unlawful unilateral changes, and all three challenged paragraphs arise out of the same factual situation. Moreover, Respondent's defenses as aptly demonstrated at hearing are the same to all allegations, that is, if Respondent did not make unlawful unilateral changes, the strike will not be found to be an unfair labor practice strike. Accordingly, I find that a sufficient nexus exists between the allegations in the Union's charge as remanded by the Office of Appeals and those contained in the challenged paragraphs. *Hamilton Plastic Products*, 309 NLRB 678, 683 (1992). Moreover, I find that the challenged paragraphs are not just closely related to the timely charges, but are also inextricably intertwined. See *Texas World Service Co., v. NLRB*, 928 F.2d 1426, 1436–1437 (5th Cir. 1991).

For the reasons stated, I deny Respondent's motion to strike in toto.

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[4] I agree with and adopt the General Counsel's argument, p. 3 of its opposition to Respondent's motion to strike portions of the complaint (GC Exh. 1(qq)): "[A] complaint may allege violations not alleged in the charge, even if untimely, so long as the new allegations are closely related to a timely filed charge." The General Counsel goes on to state that changes in health and welfare benefits as a result of Respondent's declaration of impasse are sufficiently closely related to changes in wages, where both charges are made on the same date for the same reason, e.g. [alleged], impasse.

[5] The issue regarding whether Respondent made certain unilateral changes when the parties were not at impasse and the issue regarding the nature of the strike arise out of events within the same general time period as alleged in the charges. See *Well-Bred Loaf, Inc*., 303 NLRB 1016 fn. 1 (1991). I also find that defenses to the impasse and strike issues would involve the same or similar defenses. See *FPC Holdings, Inc.*, 314 NLRB 1169 (1994), enfd. 64 F.3d 935 (4th Cir. 1995); *Carpenters Local 35 (Construction Employers Assn.)*, 317 NLRB 18 (1995).

B. The Facts

1. Background

The controversy herein arises out of a series of negotiations during 1994 and 1995 between Respondent and the Union for a successor collective-bargaining agreement. The record contains the expired agreement effective 1991–1994 (Jt. Exh. 1). What would have seemed a relatively simple task, to negotiate a new agreement between parties with a history of amicable (more or less) relations over the years was made complex, frustrating, and so far impossible to overcome by a series of related collateral events, the total effect of which was to defeat the effort for a new agreement and bring the parties to the Board. A strike continues, awaiting not just settlement of the issues but proper nomenclature, economic or unfair labor practice, with the different rights and privilege which may innure to the strikers depending on what they are.

a. CalMat

Respondent operates in the southern California area where it performs work in the rock, sand, and gravel industry. As it prepared to begin negotiations for a new labor agreement with the Union, Respondent sounded familiar themes: that it was being battered by changing technology and increasingly aggressive competition from nonunion employers in the industry. Though it did not exactly claim to be losing money, Respondent entered negotiations seeking concessions from the Union in order to be competitive. In this respect it was emboldened by its successful negotiations with other Unions, prior to the onset of these negotiations. Respondent also sought to rectify alleged wage compression, whereby less skilled employee wage rates were bumping up against more skilled employees creating morale and other problems. Finally, Respondent sought to remedy a perceived problem with its pension plan, which I will discuss in detail below. For now, it suffices to say that Respondent had been sued twice in recent years over pension related disputes and Respondent believed it was essential to change the pension plan in a way that lessened or eliminated its exposure to future lawsuits.

Respondent's chief negotiator and spokesperson and lengthy witness at hearing was Mason Dickerson, vice president for human resources. Assisted by Jeffrey Dyer, Respondent's labor relations manager, Dickerson attended all negotiating sessions, formulated strategy and goals, drafted proposals, and sent and received letters to and from the Union.

b. The Union

The Union represented about 100 employees employed by Respondent and a number of other employees employed by other companies in the same general area and the same business as Respondent. Although the Union had negotiated wage and benefit increases in the 1991–1994 collective-bargaining agreement with Respondent, in recent years, it found itself victimized by the same economic forces as those besieging Respondent. That is, nonunion employers were becoming more aggressive in seeking business, and not just employers who had always been nonunion. In recent times, the Union struck an employer in the rock, sand, and gravel industry for a number of weeks, only to make an unconditional offer to return to work without resolution of the underlying issues. Sometime after, the Union was decertified and the Employer became nonunion.

The Union's chief negotiator and spokesperson was its business manager, William Waggoner, a longtime union official and lengthy witness at hearing. Called as an adverse witness by Respondent and as a rebuttal witness by the General Counsel, Waggoner ably presented the Union's point of view on the pending issues. Waggoner was assisted in negotiations by Steve Billy, union treasurer. In those few cases where Waggoner was not present at negotiations, Billy took over. In most cases both attended.

2. Additional background

a. Nature of negotiations

For several years prior to 1989 the Union negotiated with employers in the rock, sand, and gravel industry in southern California on a multiemployer basis. Beginning in 1989, the Union withdrew its consent to multiemployer bargaining and negotiated separately with various employers including Respondent. To a certain extent, the employers such as Respondent and LG/BD continued to coordinate their bargaining by insisting in the instant negotiations that Mason Dickerson, Respondent's chief negotiator, would be a member of LG/BD's negotiating team and John Clemente, chief negotiator for LG/BD, would be a member of Respondent's negotiating team.

b. Teamsters and Machinists negotiations

Sometime prior to April 1994, Respondent began negotiations with Teamsters Local 420 and two other Teamsters Locals, representing smaller units of employees. Respondent opened negotiations asking for concessions of 20 percent in wages and benefits such as holidays, vacations, health and welfare caps, etc. Ultimately the parties agreed to a new labor agreement with a savings of about 14 percent. Of the concessions granted to Respondent, the most important was the Teamsters consent allowing Respondent to contract with outside haulers to transport its product. This resulted in Respondent saving tens of thousands of dollars per month (R. Exh. 29).

Teamsters Local 166 of San Bernandino County agreed to similar concessions with Respondent.

The other Teamsters local, Local 186 in Ventura, did not agree to Respondent's concessions and instead decided to strike. After about 10 weeks, Local 186 made an unconditional offer to return to work. Local 186 never did reach agreement with Respondent and is working under implemented terms and conditions of employment.

Respondent also negotiated a new labor agreement with desired concessions estimated at about 14 percent from a Machinists local which represented about 12 employees in a classification described as heavy-duty repair. This result occurred during the negotiations with the Union in the present case.

As negotiations were about to begin, chief union negotiator, Waggoner, was aware generally of Respondent's results with the Teamsters described above. During negotiations with Respondent, he also became aware of the Machinists results as described above. With Waggoner, Respondent's negotiators took the position that it needed the same concessions that it had received from the other unions because, Respondent argued, the same conditions were present which compelled settlement with the other unions, i.e., the threat to its business from nonunion competitors paying lower wages and benefits than what Respondent was required to pay by the expired collective-bargaining agreement. Waggoner, however, was not convinced by these reasons and stated at the first negotiations on Au-

gust 22, 1994, that he could care less what the Teamsters did; the Operating Engineers were not the Teamsters.[6]

c. The pension issue

Not mentioned in detail up to now is the pension issue which was to become of paramount importance in the negotiations. In the Teamsters' negotiations, the pension issue played little or no role, because the Teamsters' pension was different from that which applied to the Operating Engineers. The Teamsters' pension fund is a Taft-Hartley governed fund with an equal number of trustees from management and labor. Periodic reports must be submitted to the Government on the financial condition of the pension fund. Any changes in the structure of the pension fund must be agreed to by the trustees and a change in benefits during negotiations with an employer is relatively simple once the trustees (and the parties) reach agreement.

By comparison, the pension plan in effect here is not governed by Taft-Hartley. Called the southern California Rock Products and Ready Mix Concrete Industries—Operating Engineers Retirement Fund (the Plan) is not jointly administrated and as originally agreed to, labor played no role in the administration of the Fund. The governing trustees, known as the Pension and Insurance Committee (PIC), are either management representatives and/or are selected by the participating employers. Counsel for the PIC is also selected by the employers. It is characterized as a "defined benefit" plan meaning that the benefit per employee is defined by the number of hours worked within the industry. For each 1000 hours worked, an employee receives one credit. Historically, the parties have negotiated a benefit level, i.e., a dollar value for each credit. Historically, the parties have also negotiated a fixed contribution rate that remains part of the labor agreement during its term. During the term of a given collective-bargaining agreement, the plan has been over funded which happened in 1989 and 1994. This led to a dispute between Respondent and the Union over whether the Respondent could reduce its contribution to the plan or whether the contributions should remain the same and the employee benefits should be increased.

The two disputes referred to above led to lawsuits in Federal court against Respondent by employees and union agents attempting to compel Respondent to increase benefits. The second of these lawsuits was dismissed on Respondent's motion for summary judgment and is now on appeal to the Ninth Circuit Court of Appeals.[7] That lawsuit has played little or no role in the instant case. By contrast, the first lawsuit resulted in a court-approved settlement agreement in 1991. Arrived at with the assistance of a court-appointed master, the settlement agreement included what was to become known as amendment to the Pension Plan 18. Under amendment 18, no changes could occur in the Plan without the consent of the Union and two-thirds of participating employers employing 75 percent of the plan members.[8]

Respondent took the position that in order to eliminate its exposure to lawsuits, it needed to make certain changes in the plan, changes which would have affected amendment 18.[9] More specifically, Respondent desired to eliminate the contribution rate from the labor agreement and allow it to "float," while continuing to negotiate over the benefit levels which would continue to be specified in the labor agreement. Then periodically; Respondent would receive reports from its actuaries as to the amount needed at any given time to fund the level of benefits specified in the labor agreement. Respondent would then increase or decrease its contributions to the plan in accord with the actuaries' reports.

For a variety of reasons, the Union opposed this plan: it would strip the Union of its input under amendment 18; it might place the plan benefit in jeopardy; it might implicate ERISA[10] in some way; it might violate the terms and conditions of the settlement agreement approved by the court,[11] and perhaps other reasons as well. In formulating its position, the Union was not relying on idle speculation. According to Waggoner, sometime in the mid-1980s, the plan was underfunded for a period of time and a threat developed to the plan's solvency. The Respondent and other participating employers explained to the Union that the plan's actuaries, selected by these very same employers, had miscalculated as to the contribution levels needed. Ultimately, the Union felt forced to ask its members to do what was necessary to make the plan whole. Members agreed to allocate 50 cents an hour from their wages to increase the contribution levels so the plan remained solvent. This experience may have contributed to the Union's position in later years when the plan was overfunded and the Union demanded that benefits be increased, and to the Union's reluctance to accept Respondent's proposals regarding changes during present negotiations. The Union apparently felt that the underfunding of the mid-1980s resulted in whole or in part from the Union's lack of participation in the administration of the plan. Under amendment 18, the Union felt that it had some degree of participation in the workings of the pension plan and the Union was not inclined to relinquish whatever power or control it possessed.

No discussion of the pension issue would be complete without alluding to the role played by James Bowles, a witness for Respondent. Bowles is an attorney who practices management side labor law. One of his law partners represents the PIC. Bowles was retained by Respondent and other participating employers "to engage in coordinated collective bargaining of

[6] In a union publication dated August/September 1994, there is a reference to "tough" negotiations to come "because of the wage concessions the Teamsters already have agreed to." The article goes on to refer to prenegotiation meetings held with union members who emphatically express opposition to any reduction in hour wages. Other concessions sought by Respondent were characterized in the publication as "ridiculous" (R. Exh. 3).

[7] The opinion of the U.S. district judge is in the record (R. Exh. 33). At one point, Respondent's counsel claimed that the decision had some sort of res judicata effect binding on me in the instant case (Tr. 650). This position has not been adequately developed and I reject any contention that the decision of the district judge will determine any issue here.

[8] Underlying the litigation in the instant case is the assumption that the parties could negotiate over an issue, the end result of which, if agreement had been reached, would have been to vary the terms and conditions of the court-approved settlement agreement. Other than to question this assumption during the hearing (Tr. 480–481), I express no opinion on the matter.

[9] Other elements of the settlement agreement included a decrease in the contribution factor and an increase in the pension credit.

[10] Employee Retirement Insurancy Security Act.

[11] As I expressed misgivings about the issue as noted in fn. 8 above, Waggoner, a witness at the time, volunteered, "That is our position, Your Honor, that it couldn't be changed" (Tr. 481). However, I cannot find evidence in the record that the Union opposed Respondent's pension proposal on that specific ground during negotiations.

the pension issue only" and so informed the Union by letter of March 13 (R. Exh. 8). On March 17 Waggoner responded by letter to Bowles. First, Waggoner agreed to coordinate bargaining "in order to resolve the pension issue," and acknowledged that he had made suggestion to that effect on March 3, at an important negotiating meeting to be further described below. Waggoner went on to note in his letter that followed the March 3 meeting, Respondent had declared impasse and implemented proposals to cut wages and health benefits. Waggoner declared that unless the implementations were rescinded, he would still agree to "meet on a coordinated basis with the employers named in your letter except CalMat, Livingston-Graham and Blue Diamond" (R. Exh. 9).[12]

On March 21 Bowles wrote back to Waggoner asking that the Union reconsider its position with respect to excluding Respondent lest the Union commit an unfair labor practice refusal to bargain in good faith on a mandatory subject of bargaining (R. Exh. 10).

On March 30 Waggoner wrote back to Bowles denying any refusal to bargain in good faith (R. Exh. 12).

There followed a blizzard of correspondence between the parties regarding not only who Bowles was representing, but whether the Union was delaying negotiations[13] and/or engaging in regressive bargaining[14] (R. Exhs. 13–20). In any event, the parties finally met on May 30 at the Union's office for their single negotiating session over the pension. Some of the correspondence referred to above had contained proposals or counter/proposals including that contained in a Waggoner letter of April 11 to Bowles: "an increase in the benefit rate to $45.00 per credit, retroactive to November 1, 1993; the contribution rate to remain the same at $3.35 per hour per employee; and all contractual language to remain the same" (R. Exh. 14). As already noted, Bowles considered this proposal to be regressive. Without characterizing the Union's proposal, I note that on January 13 the Union submitted a proposal which included, "Pension Credit Increases Effective":

October 1, 1994	$39.00
July 1, 1995	$43.00

[Jt. Exh. 35.]

Waggoner opened the May 30 meeting by making a vulgar comment regarding Bowles intention to continue screwing the working man. In light of the opening remarks and the background of correspondence and prior negotiations, little if anything, of substance occurred. Bowles restated the employer's desire to remove the contribution rate from the labor agreement, but Waggoner responded that the Union liked it, "that we can sue you guys every couple of years and change benefit levels that way." While Bowles mentioned a covenant not to sue as a possible remedy to the employer's perceived dilemma, it went nowhere.

Ultimately the parties agreed that under present conditions, further meetings would be pointless and the meeting ended as it began with Waggoner telling Bowles to take his proposal and stick it up his ass. On June 2 Bowles wrote to Waggoner purporting to summarize the results of the meeting from the Employers' point of view (R. Exh. 21). And on June 7 Waggoner wrote back to Bowles correcting Bowles' letter "in several respects." First Waggoner denied that the parties are at impasse. Second, Waggoner noted that all major employers in the Rock Products Industry have now implemented wage and benefit cuts which the Union considered unacceptable and unlawful.[15] Finally, the Union contended that any implementation of the pension proposal would be in violation of the 18th amendment to the plan (R. Exh. 22). About 3 weeks after this letter was sent, Respondent implemented its pension contribution rate proposal.

I will revisit in the analysis and conclusions section of this decision whether the Union was dilatory in negotiating with Respondent including the Bowles segment. For now it seems pointless to resolve the issue of whether the Union ignored its plain statement of position expressed over and over in its correspondence that it would not negotiate with Respondent and LG/BD (R. Exhs. 9, 12, 14, and 19). Bowles took the position that at the meeting of May 30, Waggoner not only did not repeat again his position expressed in the correspondence, but asked questions about and referred by name to Respondent in the discussions in such a way that Bowles concluded that Waggoner had changed course and was negotiating with Bowles as a representative of Respondent. I note that Waggoner's letter of June 7 (R. Exh. 22), referred to above, does not specifically disavow Bowles' letter of June 2 (R. Exh. 21) in which Bowles states in part, that he told Waggoner on May 30 that he was representing Respondent as well as other named employers on the pension issue. Moreover, without Respondent and LG/BD as part of the employer group being represented by Bowles, the whole exercise of May 30 would have been a nullity since under amendment 18 to the plan, unless Respondent and LG/BD consented to any agreement with the Union over the pension issue, there was no agreement.[16] In the final analysis, it made no difference exactly who Bowles was representing. First, there was no agreement on the pension plan and no evidence suggests that Respondent and LG/BD made any difference to the lack of agreement whether

[12] As an example of the topsy-turvy state of these negotiations, I note that the Union ended coordinated bargaining in 1989 over the employers' objection. On March 3, when Waggoner suggested the Union might agree to coordinated bargaining to resolve the pension issue, it was Dickerson who expressed disapproval, suggesting it was late in the day for that strategy. Notwithstanding Dickerson's rebuff, the Employer's retained Bowles. Notwithstanding Waggoner's unconditional expression of interest, the Union refused to consider Respondent as part of the negotiations on the pension.

[13] In the endless exchange of correspondence, Bowles was faxing all or most of his to the Union, while Waggoner was sending his to Bowles by certified mail, return receipt requested.

[14] According to Bowles, the Union made a pension benefit rate proposal of $45 per credit which was higher than a union proposal made to the employers on January 13, 1995 (R. Exh. 20).

[15] The General Counsel has never made it clear to me why this Respondent [and LG/BD which settled] have been singled out for prosecution when the Union claims all other employers in the industry have also made alleged unlawful implementations. Moreover, as I understand it, the Union filed identical charges against all the employers, but only those against Respondent and LG/BD were found to have merit. In any event, my bewilderment implies no legal significance for Respondent.

[16] Evidence had been presented at hearing to show that in 1993, the Union received notice that the pension plan was again overfunded and the Union requested that negotiations be reopened to address the over-funding. Ultimately, the parties agreed to reopen negotiations and reached agreement that benefits in the pension plan would be increased by $1 per hour. This agreement was voided when under amendment 18, a participating employer, Transit Mix, objected to the agreement and blocked it by withholding consent.

the Union acquiesced or not as to their participation through Bowles. Moreover, the implementation of March 6 on wages and health and welfare was either unlawful or not without regard to who Bowles was representing and will be determined below.

3. The negotiations

On July 1, 1994, the Union notified an official of LG that it desired to begin negotiations on a new collective-bargaining agreement (Jt. Exh. 6). On July 8, 1994, John Clemente, on behalf of LG/BD wrote back acknowledging the Union's letter and asking for additional time to explore the possibility of coordinated bargaining with one other signatory company [presumably Respondent] and the Union (Jt. Exh. 7).

a. August 22, 1994[17]

On behalf of Respondent, Dickerson stated that Respondent was looking for reductions in wages and benefits comparable to what Teamsters Local 420 had agreed to. Dickerson also expressed a desire to remedy an alleged wage compression problem by which the least skilled classifications was bumping up to middle and high skilled positions. The Union tendered its first proposal to Respondent (Jt. Exh. 27) and Respondent tendered its first proposal to the Union (Jt. Exh. 29). Respondent did not offer specific wage or health and welfare (H&W) proposals but did propose that the pension plan be revised to eliminate the contribution rate from the labor agreement and to retain the current benefit levels. Other proposals dealt with overtime (OT) (1-1/2 time after 10 hours per day and after 40 hours per week), with vacations (80 hours' cap for contract term), and with holidays (reduce from 8 to 3 holidays). Respondent also proposed to delete "and future" from the contract meaning that any future plants acquired Respondent would not be covered by the agreement.

Like Respondent, the Union did not present a wage proposal, but as to H&W, proposed increasing the cap to $559 per month, as to pension plan proposed to retain contribution rate in contract and increase benefits $38, $39, and $40 for each of the 3-year term. Proposals were also made on OT (retain status quo), vacations (add 40 hours, after 8 years and after 15 years) and holidays (increase from 8 to 9).

b. September 9, 1994

On September 9, 1994, the Union tendered to Respondent a letter stating in the future it would not agree to coordinated bargaining (Jt. Exh. 9(a)). No proposals were exchanged on this date and each side maintained its position as previously described.

c. September 16, 1994 (a.m. only)

On this date, Respondent provided its second set of proposals to the Union (Jt. Exh. 30). Respondent made no change in any area except to submit a list of three job groups. Dickerson discussed desired concessions in the area of 20 percent. While the Union produced no proposals nor made any changes in its position, Waggoner made some reference to or request for Respondent's financial records to justify its request for concessions. Dickerson responded, You already have them. Those are in our annual reports (Tr. 832–833).

[17] The first two bargaining sessions consisted of Respondent and LG/BD negotiating jointly with the Union.

d. October 3, 1994

Respondent presented its third proposal (Jt. Exh. 32) in which it proposed certain wage reductions within the three job groups referred to above, with the biggest reductions for the least skilled job. As to H&W, Respondent proposed to retain the trust fund with a cap of $375. No changes in any other area was proposed. The Union made no proposals nor any changes in its position.

On October 31, 1994, Dickerson sent a letter to Waggoner which reads as follows:

> October 31, 1994
>
> Mr. Bill Waggoner
> Business Manager and General Vice President
> Operating Engineers Local Union 12
> 150 Corson St.
> Pasadena CA 91109–7209
>
> Re: Contract Negotiations between CalMat Co. and IUOE Local 12
>
> Dear Mr. Waggoner:
>
> The purpose of this letter is twofold. One, to request future meetings to continue our negotiations and two, to present CalMat's proposal regarding pension benefits.
>
> As to scheduling meetings, CalMat has not heard from Local 12 since the Union canceled two meetings scheduled for October 10 and 14. Please advise us of your availability to meet. We realize that Local 12 has other contracts to bargain in the rock and sand industry therefore we again offer to meet at the same time as Livingston-Graham/Blue Diamond, since CalMat's proposals are virtually identical to theirs. Please advise us of your available dates as soon as possible.
>
> In preparation for our next meeting we have enclosed CalMat's proposal regarding pension benefits. As you can see, the Company proposes *to increase the pension benefit factor by $2.00 (form $37 to $39 per month) retroactively effective October 1, 1994.*
>
> There seems to be a misunderstanding among many of our employees on the pension issue. We are told that Local 12 is saying that the Company is attempting to take away pension benefits. Nothing could be further from the truth. We have not at any time in these negotiations proposed a pension benefits reduction. To the contrary, we now offer an increase!
>
> As you are well aware, the employees' pension plan is a defined benefit plan. Yet, for years, our agreement with Local 12 has also defined the amount of the Employers *contribution*, a very, very unusual agreement. This has led to two lawsuits. *This simply cannot continue. We must define the benefit— not the contribution*.
>
> Our proposal to increase the benefit factor to $39 per month is simple and straightforward. Eligible retiring employees (your members) will receive $39.00 per month for each year of credited service–guaranteed! The Company is absolutely obligated to provide the monthly benefit.
>
> According to estimates from the actuaries, the Company is able to offer the $2.00 increase in benefits and still save approximately $0.80 per hour in future contributions. *This is especially good news during these times of "roll-back" contracts. We can increase the pension benefit and use the $0.80 to offset the proposed reductions in wages.*

This may be our best opportunity for a win-win situation.

We look forward to discussing this and other issues during our next meeting, which hopefully is very soon.

Very Truly Yours,
/s/ Mason Dickerson

Mason Dickerson
Vice President, Human Resources
enclosure

[Jt. Exh. 10.]

On November 10, 1994, Waggoner wrote back to Dickerson as follows:

November 10, 1994

CERTIFIED - RETURN
RECEIPT REQUESTED

Mason Dickerson, Vice President
Human Resources
CalMat Company
3200 San Fernando Road
Los Angeles, California 90065

Dear Mr. Dickerson:

Negotiations between Local 12 and the company that you represent have been unproductive to date because of the unacceptable demands in your proposal.

As you are aware, John Clemente who represents Blue Diamond and Livingston Graham, has agreed to accept the assistance of federal mediation.

Although we have had only one meeting, of which you were in attendance, I feel that federal mediation can be of assistance in reaching a settlement.

I am therefore requesting that federal mediation be invited in any future negotiations between CalMat and Local 12.

Sincerely,
/s/ Wm. C. Waggoner

Wm. C. Waggoner, Business Manager
I.U.O.E., Local Union No. 12
and General Vice President

[Jt. Exh. 13.]

On December 13, 1994, Dickerson wrote a letter to Waggoner which reads as follows:

December 13, 1994

Bill Waggoner
Business Manager
Local 12
150 East Corson Street
Pasadena, CA 91109–7209

Dear Mr. Waggoner:

This letter will serve as the confirmation of our meeting scheduled for December 20, 1994 at 10:00 a.m. at the FMCS offices in Orange, CA for the purpose of negotiating a new labor agreement between CalMat Co., Los Angeles Region, and your Union.

This will be the first meeting between the parties since October 3, more than two months ago. We believe that the Union is deliberately delaying its negotiations with CalMat. There are several facts which show this is the case:

(1) Since the Union first asked to open contract negotiations on July 1, 1994, over five (5) months ago, you have been willing to meet with CalMat only four times. That is less than one meeting a month, and two of those meetings (August 22 and September 9) involved coordinated bargaining with Livingston Graham and Blue Diamond. The only meetings with CalMat alone were on September 16 and October 3. In total, you have spent only a few hours in our negotiating meetings.

(2) You canceled negotiating meetings which had been scheduled for October 10 and 14. You did not try to reschedule meetings. I had to send you a letter dated October 31 demanding that you schedule another meeting before you finally did so. Even then, you tried to postpone that meeting (now scheduled for December 20) until January 1995.

(3) In September, the Union changed its position and refused to meet jointly with CalMat and the other companies in a coordinated bargaining arrangement. You have used this to delay the negotiating process.

(4) The Union has requested, prematurely in our view, that a federal mediator become involved in the negotiations. While we are willing to meet with a mediator present, we are not willing to have the Union use the FMCS as a further excuse to delay bargaining.

In short, by the time we meeting on December 20, eleven (11) weeks will have elapsed between meetings. This is clearly unacceptable and constitutes bad faith bargaining.

Given the Union's abysmal record, CalMat hereby requests that the Union come to the December 20 meeting prepared to schedule enough negotiating sessions so that the parties can reach agreement by January 20, 1995. CalMat is available to meet on each of the following dates:

December 21, 22, 23 and 27; and January 3, 7 (Saturday), 14 (Sunday), 15, 16, 17, 18, 19 and 20.

Additionally, I will work to free my calendar on any other dates prior to January 20 on which the Union is available to meet.

Very truly yours,
/s/ Mason Dickerson

Mason O. Dickerson
Vice President
Human Resources

[R. Exh. 4.]

e. December 20, 1994

This meeting was the first held with the Federal mediator in attendance. The parties first discussed Respondent's proposal including the one sent to the Union with the letter of October 31, 1994, recited above. Respondent increased its H&W cap to $400 per month and increased its pension benefit to $39. In addition, Respondent increased its vacation cap to 120 hours' for the term of the contract and increased holidays to 4. Reporting pay was increased from 2 to 4 hours just for showing up.

When pressed by Respondent for a proposal, Waggoner said we'll give you one: 1-year extension of current agreement, 25 cents' cap on H&W and $43 pension benefit increase. Dickerson rejected the Union's proposal out of hand and considered it to be nonserious. Before adjournment, Dickerson explained it was necessary for concessions to be competitive. Dickerson continued that Respondent was primarily concerned with Owl/Robertson and Waggoner asked for its rates which Dickerson said he knew (R. Exh. 30). Also before adjournment, Dickerson asked Waggoner if it would be possible to meet before January 16 but Waggoner said no. Dickerson asked if Waggoner would send any proposals in the mail before the next meeting so there would be time to study them. Waggoner said he couldn't promise anything. Then Waggoner said he had to leave the meeting early in order to study Respondent's latest modification of its proposals.

f. January 16

Respondent proposed to increase wages by $1.35 over the 3-year term, to increase the cap on H&W by $25 of the second year (to $425) and by $25 on the third year to ($450). As to the pension plan, Respondent renewed its proposal on the contribution rate, but proposed to increase pension benefits by $1 a year for 3 years ($39, $40, and $41) (Jt. Exh. 36).

The Union also submitted a written proposal to increase wages by 75 cents (25 cents on September 15, 1994, and 50 cents on September 15, 1995), to increase pension benefits ($39 on October 1, 1994, $43 on July 1, 1995). The Union continued to insist that the contribution rate remain in the contract (Jt. Exh. 35).

At the conclusion of the meeting, Waggoner presented to Dickerson a letter which requested certain financial records and information (Jt. Exh. 14). As the Union concedes (Br. at 35), the General Counsel found the Union's charges with respect to most paragraphs in this information request lacking in merit, because Respondent had not claimed an inability to pay. Accordingly, only a portion of this information request presents an issue in the case, to be considered below.

g. January 19

Both sides exchanged proposals at this meeting: Respondent, however, made no changes from past proposals (Jt. Exh. 38). The Union did make certain changes in its proposal (Jt. Exh. 37). As to wages, the Union increased its demand from 75 cents on January 16 to $1.50-wage increase (25 cents as of September 15, 1994, 50 cents as of February 1, 1995, and 75 cents as of February 1, 1995). Respondent rejected this proposal and the Union made no concessions from the expired contract on any major economic areas.[18]

h. February 2

At this meeting, Respondent again made a written proposal that made no changes in past proposals (Jt. Exh. 40). The parties spent most of the time talking about a pension-related topic, the proper disposition of a supposed 80-cents savings in administration of the pension plan.[19] Waggoner took the position that he had no authority to negotiate over the 80 cents until the hands (members) told him to. There was also a discussion of Respondent's authority to negotiate over the pension since in at least one past occasion, Respondent was unable to deliver the agreements of all employers required by amendment 18. Dickerson recognized the problem, but told Waggoner's associate, Billy, that Respondent had veto power over changes in the pension plan. Waggoner asked for a letter saying Respondent was authorized to apply the 80 cents to wage and benefits. Notwithstanding their alleged lack of authority to negotiate over the 80-cents savings, the parties spent some time quibbling over who would make a proposal over the issue and just what would constitute a proposal. Dickerson testified he was attempting to trade that 80 cents for the Union's agreement on taking the contribution rate out of the labor agreement. In the end this strategy went nowhere and nothing was accomplished.

On February 9 Dickerson wrote a letter to Waggoner which reads as follows:

> VIA MESSENGER
> February 9, 1995
> Mr. William C. Waggoner
> Business Manager and General Vice President
> International Union of Operating Engineers, Local 12
> 150 East Corson Street
> Pasadena, CA 91109–7209
>
> Dear Mr. Waggoner:
>
> When you abruptly waked out of our February 2, 1995 negotiations, you provided the best evidence yet that it is your clear intent to delay, delay, delay. By our account you spent a scant 56 minutes in the same room with us, refusing to offer even one counter to the Company's proposals and refusing to listen to the Company's review of the Union's proposals.
>
> Your reasons for refusing to continue negotiations that day are spurious. First you say you cannot continue without the financial information previously requested. Then you complain that you don't have enough information concerning what our competition is paying. Then you insist that you have the right to know what CalMat is planning to pay employees at Triangle Rock, including Morongo. And finally you "discover" that CalMat does not have unilateral authority to negotiate a change in the Rock Products Association Pension Plan. So you announce that these negotiations are on hold and you walk out.
>
> Even though your complaints are an obvious pretext to further stall meaningful negotiations, I will individually address them below.
>
> *Financial Information—*
>
> As I informed you at the meeting, CalMat's response is contained in our letter to you dated January 19, 1995. It is still our position that Local 12's re-

[18] While it is clear to me that little was accomplished at this meeting, I am puzzled by Dickerson's testimony regarding the length of the meeting. At first he testified this was one of the longer bargaining meetings (Tr. 578); then he testified that the meeting ended with the Union walking out without allowing Dickerson an adequate time to respond to the Union's proposals (Tr. 580).

[19] The origin of this 80-cents figure relates back to the letter of Dickerson to Waggoner of October 31, 1994 (Jt. Exh. 10), published above. There, Dickerson discusses a savings of 80 cents per hour in future contributions and the use of the 80 cents to offset the proposed reductions in wages. Why the topic suddenly arose 3 months later is not clear.

quest for financial information is irrelevant, and CalMat need not respond to it.

Competititor's Pay–

We have provided you with information concerning Owl Rock Products' rates of pay both at the bargaining table and in our letter of January 19, 1995. As you are no doubt aware, there are numerous other companies paying substantially less in wages and benefits than CalMat currently is. Examples include P. W. Gillibrand in Simi Valley who is paying from $12.00 to $16.00 per hour for operators. Quality Rock in Moorpark pays $7.00 per hour for "unskilled" up to $13.00 for "skilled" personnel. Channel & Basin reclamation, Inc. pays, on average, from $12.00 to $14.00 per hour for its workers, with a $10.00 per hour top rate for Conveyorman. Empire Rock in Alta Loma pays its Repairman up to $20.00 per hour with Operators in the $18.00 to $20.00 range. Additionally, these companies, overall, pay less in benefits than CalMat is proposing.

The above confirms that what we have proposed in wages and benefits is competitive, and in many cases, surpasses what other companies are paying.

Triangle Rock—

Again, for the record, Triangle Rock, Irvine Lake (provided the deal goes through) is not a direct competitor to CalMat with its market in Orange County. Therefore, what they pay is irrelevant. Even so, they are planning to offer a wage and benefit package which is less costly than what we have proposed.

Association Pension Plan—

This is the biggest non-issue of the group. CalMat has been and continues to be willing to negotiate on a coordinated basis with certain other companies, but it was you, Mr. Waggoner, who has refused to negotiate with more than one company at a time. In fact, you were the one responsible for destroying the industry's multi-employer bargaining arrangement in August, 1989, breaking up a forty (40) year bargaining history. In 1989 the parties had no trouble reaching accord on pension. And again in 1991, no problems were encountered and you never raised the issue once. But now, after two contract negotiations and seven months into the third, you suddenly are concerned that we cannot bargain on the issue of pension without a letter of authorization? Frankly, that's unbelievable.

Since you walked out last Thursday without allowing us a chance to review your proposals I have enclosed a summary of the Union's proposals and the status of each. You will note that we have agreed to two more of your proposals. One concerns using 173 hours as the basis for adjusting wages to pay for changes in Health & Welfare premiums. The other is renewing the Letter of Agreement concerning contracting out of work. We also are offering a counter to the Letter regarding Drug and Alcohol testing to incorporate a reference to the applicable laws and regulations.

Also, enclosed is a summary of the Company Proposals.

The Union has made very few counter proposals during these negotiations, indeed CalMat often has bid against itself. But no more.

We will see you Monday, February 13, 1995 at 10:00 A.M. at the FMCS office in Glendale. At that meeting the Union ought to be prepared to make whatever movement it intends to make during these negotiations. We see no legitimate reason these negotiations cannot be concluded in a short period of time.

Very truly yours,
/s/ Mason Dickerson

[Jt. Exh. 18.]

i. February 13

At this meeting Waggoner delivered to Dickerson a letter in response to the February 9 letter published above. Waggoner's letter reads as follows:

February 13, 1995

HAND-DELIVERED & CERTIFIED MAIL—
RETURN RECEIPT REQUESTED

Mason Dickerson
Vice-President, Human Resources
CalMat Company
3200 San Fernando Road
Los Angeles, CA 90065

Dear Mr. Dickerson:

I was extremely disappointed at both the tone and content of your letter to me dated February 9, 1995. I do not understand how you expect Local 12 to bargain in good faith while you keep accusing us of bad faith. I remind you that it is CalMat, not Local 12, which is proposing drastic changes in wages, benefits, and other working conditions. Your refusal to disclose financial information leads us to believe that these changes are not required as a result of any financial problems your company may be suffering from. Making employees take as much as a $7.00 per hour cut while CalMat reaps huge profits is not bargaining in good faith.

I must again renew my request for the financial information previously demanded. Your employees are entitled to see this information before they can knowledgeably cast a vote as to whether to ratify an agreement containing the drastic cuts you propose. I do not know how, in good conscience, I can submit a proposal such as this with a recommendation for approval by the membership unless these records are turned over for inspection.

With regard to the information you have given us concerning your so-called competitors, that information is incomplete and worthless. Where are these so-called competitors located? How many Operating Engineers do they employ? What prices are they charging? How many jobs have they taken away from you? Without such information, there is no way for us to judge whether *any* reductions in pay, let alone the cuts you seek, are justified.

With regard to Triangle Rock, your conduct and contradictory statements leave many questions unanswered. Who owns this operation? When will the deal at Irvine Lake be finalized? What will happen to the employees?

Also, how can you complain about nonunion "competition" when you wind up competing against yourself? What we are faced with here is an operation being sold by one union employer to another union employer, with a threat to operate it nonunion. You tell me how Local 12 is supposed to interpret such conduct.

Finally, with regard to the pension plan, our comments at the February 2, 1995, session were caused by the recent history of our efforts to amend the plan. On October 22, 1993, as a result of the pension reopener, Local 12 received a letter signed by yourself, John Gresock and John Clemente indicating agreement to propose that the Association Pension and Insurance Committee increase pension credits from $37 to $38 effective November 1, 1993. This proposal was never ratified by the Plan and never went into effect. Other negotiations were also unsuccessful in adjusting pension credits. Then, your own accountant reported that the plan was in danger of becoming overfunded again, but you stalled on negotiating a resolution of this problem and no resolution has yet been reached. As of now, this issue is in litigation. A big part of the problem is the Association's rules, requiring any change be approved by two-thirds of the employers who employ three-fours of the employees in the plan. You yourself admitted that CalMat has the votes to block any change to the plan of which you do not approve. That is why we are so concerned about the status of negotiations concerning the pension plan.

I look forward to further negotiations eventually leading to a mutually acceptable agreement. But there are numerous problems which remain, many of them caused by conflicting statements and positions on the Employer side. Addressing these problems will go a long way towards moving these negotiations forward. Your cooperation in this regard will be appreciated.

Very truly yours,
/s/ Wm. C. Waggoner
Wm. C. Waggoner,
Business Manager
I.U.O.E. Local Union No. 12
and
General Vice President

[Jt. Exh. 19.]

The Union repeated the theme at the meeting that it was entitled to certain information on competitors which it had not received from Respondent. For example, several times Waggoner asked, "[W]ho are these other competitors?" Dickerson responded, "[M]ainly Al Robertson," then added, "[W]e've given you what we know." The Union presented a written proposal (Jt. Exh. 41) which included a small change regarding vacation rates. Respondent made an oral proposal to add 25 cents to all wage rates and to agree to 173 hours per month base for H&W.

At one point in the meeting, Waggoner stated that unless Respondent takes the pension issue off the table, there would be no movement on any other issue. On February 16, Respondent transmitted to the Union, its last best and final offer (Jt. Ex. 42). This lengthy correspondence need not be published in detail. Like all or most correspondence, from both sides, it was self-serving, contentious and written with one eye on approaching litigation. It suffices to say that the letter purports to review the history of the negotiations from the Respondent's point of view.

As to the pension issue, Dickerson wrote,

> The parties are at irreconcilable odds concerning the fundamental structure of the plan. The Company insists upon a defined benefit plan only, while the Union is insisting on a combined defined contribution and defined benefit plan. You have stated you will not change your position on this fundamental issue.

Dickerson concluded his letter by stating, "[W]e are at impasse." Then Dickerson stated that effective February 27, the Company intended to implement its last, best, and final offer as to wages, H&W, and OT pay. As matters turned out, Respondent did not implement on February 27, because the Union asked for another meeting and Respondent agreed to delay the implementation, and so informed the Union (Jt. Exh. 20).

On February 28, Waggoner wrote back to Dickerson objecting to Dickerson's statement in Joint Exhibit 20: "[II]f the Union is unwilling to accept the major economic issues as a package as proposed in our Last, Best and Final Offer, we will be unable to reach agreement and CalMat will implement its Last, Best and Final Proposals on the following subjects effective March 6, 1995: Wages and Health and Welfare." Waggoner characterized this statement as an unacceptable precondition and further stated, that unless Dickerson retracted the statement, Waggoner would not be present at the bargaining session set for March 3 (Jt. Exh. 22). Dickerson wrote back on March 1 reaffirming Respondent's intent to be present and not retracting anything (Jt. Exh. 23).

On March 2 Waggoner wrote another letter, this time to Respondent's chairman of the board. It reads as follows:

March 2, 1995

HAND-DELIVERED
Mr. A. Frederick Gerstell
Chairman of the Board,
President and Chief Executive Officer
CalMat Co.
3200 San Fernando Road
Los Angeles, California 90065

Dear Mr. Gerstell:

I am writing this letter to you in an attempt to "head off" a war that neither your company or Local 12 could win.

I realize as CEO of a company as large as CalMat has a tremendous amount of responsibilities, but I think your indulgence in the current negotiations between CalMat and Local 12 are important to both parties.

Local 12 has had a contractual relationship with CalMat (ConRock) for many, many years. Although we have experienced some disagreements over those many years, we were able to maintain that relationship. Whether or not you want to continue that relationship is entirely in your hands. I can honestly make that prediction because the demands that your representatives have made at the bargaining table are ridiculous and absurd.

The proposal your company has submitted calls for a reduction of 20 percent in wages and benefits. The proposal also contains changes in the working conditions that rolls the clock back 30 years or more.

When asked at the bargaining table of your representatives if it was CalMat's intention to extend the agreement to Triangle Rock if and when a settlement of the current negotiations was reached, the reply was, *NO!,* we intend to operate Triangle Rock non-union. In my estimation, that is creating non-union competition within your own organization.

I have had about 30 years of experience in negotiating labor contracts and learned many years ago that unless you are honest and truthful with the people you are dealing with at the bargaining table, it becomes very difficult to reach an amicable settlement.

Local 12 also understands that negotiations can also become very difficult if the company with whom they are bargaining is experiencing some financial problems, but that is not the case in this situation because CalMat's recent financial report reflects reasonable profit.

Mr. Gerstell, I don't wish to see the relationship between Local 12 and CalMat dissolved, but the demands that are being made at the bargaining table are unacceptable to your employees, our members.

The cost of living has not decreased by 20 percent, nor has CalMat's profit decreased by 20 percent. So, it doesn't make sense that we have to go to war when I honestly believe that a settlement could be reached if CalMat's proposal was realistic.

Please call me if you have any questions as to the contents of this letter. If I do not hear from you, it will send me a very strong signal that CalMat is not interested in continuing our relationship unless it is on CalMat's terms.

Sincerely,

/s/ Wm. C. Waggoner
Wm. C. Waggoner, Business Manager
I.U.O.E., Local Union No. 12 and
General Vice President

[Jt. Exh. 24.]

j. March 3

The parties did meet on this date with Waggoner present to represent the Union. However, he stated to the parties that the only reason he showed up was to prevent the Company from using his absence against him with the members. Neither side had a written proposal, but the Union orally agree to four holidays and stated it would agree to Respondent's H&W proposal, if Respondent paid full cost of retiree coverage. When Dickerson asked for a cost figure, Waggoner said he didn't know. When Dickerson asked if the Union had any further movement, Waggoner responded, "[N]ot unless you get off your G__ D___ pension proposal." When Dickerson assured Waggoner that the Company was not going to get off the pension matter, then Waggoner said, "[T]hen, it looks like we are hung up on that," and Dickerson agreed (another version of Waggoner's remarks found in the record is to the effect, that if the pension issue is resolved, then we would probably put this thing together).

With respect to the benefit levels, in the pension plan, the Union asked if Dickerson could guarantee the levels. This question was apparently based on the uncertainty caused by amendment 18 and the Union's prior experience with it in 1993. Dickerson said, "[W]e guarantee it." Then the Union asked if Dickerson could secure a letter from the PIC guaranteeing the benefit levels. Dickerson asked whether such a letter was a "deal maker," i.e, the Union would agree to take the contribution rate out of the contract. Waggoner replied, "[N]o."

As reported above in the section on Bowles, Waggoner cautioned that he was not making a proposal, as he needed to clear it with legal counsel, but he queried, how would Respondent respond to the possibility of getting all employers together to discuss the pension issue. Dickerson responded in a negative tenor, but Waggoner's statement eventually led to the arrival of Bowles whose efforts were in vain.

Meanwhile, Respondent implemented its wage and H&W proposals on March 6. After the negotiations with Bowles were unsuccessful, Respondent implemented its pension contribution rate proposal on July 1. About 3 weeks later, unit employee went on strike and I will determine below what type of strike it is. Finally, on August 21 Respondent made its third and final implementation of remaining areas that had been the subject of negotiations.

Before ending this segment of the case, I report on one other contentious issue that the parties were unable to resolve. Already mentioned above, deletion of the "and futures" clause from the recognition clause of the contract received a considerable amount of attention. Respondent pointed out at hearing that the Union had agreed to delete this clause in San Diego negotiations with a company owned by Respondent. The Union contended that because San Diego was a separate economic market, it did not provided a precedent for the Union in the Los Angeles negotiations. Moreover, the Union had good reason to believe that Respondent was about to acquire a business which it intended to operate as nonunion, when and if the Union agreed to delete the clause. This presented the Union with the issue of whether it should facilitate Respondent's efforts to complete against itself as a nonunion employer, when Respondent was arguing at the table it needed 20 percent in concessions because of the competition from nonunion employers. I see the problem. Not surprisingly, the Union declined to agree to this proposal and as matters turned out, Respondent never acquired the new plant anyway.

C. Analysis and Conclusions

1. The Union's information requests

In a letter to me dated December 10, 1996, the General Counsel submitted case citations and brief arguments regarding the Union's information requests. Simply stated, the General Counsel contends that Respondent did not respond to the information requests, that the failure violated the Act, and precluded Respondent from lawfully declaring impasse. In its brief at 36–36, the Union generally supports the General Counsel's theory.

To begin, I recapitulate briefly, Respondent was seeking cuts in wages and benefits in the area of 20 percent. The Union reasonably considered these proposals to be draconian. In addition, the Respondent was seeking changes in the Pension Plan, the effect of which on members' fortunes was debatable. Accordingly, on January 16, the Union wrote a letter to Dickerson which reads in part:

In order to evaluate the Company's need for concession, Local 12 is hereby requesting, pursuant to Section 8(a)(5) of the [Act] disclosure of the following:

. . . .

> 4. Any and all memos, reports, studies, records, or other documents within the Employer's possession and/or control which, analyze any of the following factors with respect to the Employer's competitors: productivity, labor and material cost, prices, profits and losses.
>
> [Jt. Exh. 14.]

On January 19 Dickerson wrote back to the Union, stating in part:

> CalMat wants [the concessions] because we will be paying over market without them. As we have told you at the bargaining table, we understand that Owl Rock Products, a major competitor and several smaller operators are nonunion with lower wages and benefits than CalMat. For example, at Owl Rock Products, we understand that the top hourly wage rate for a conveyman is $15.50, the top wage rate for a skyloader operator is $18.50 and the top wage rate for a heavy duty repairman is $20.50. Additionally, other unionized competitors are seeking substantial reductions in wages and benefits in their negotiations.
>
> [Jt. Exh. 15.]

The parties stipulated that Dickerson gave this letter to Waggoner at the January 19 bargaining session.

On February 5 Dickerson wrote back to Waggoner in a letter (Jt. Exh. 18) which I have published above and which included information regarding competitor's pay. I have also published above, Waggoner's followup complaint dated February 13 (Jt. Exh. 19) that Respondent had not disclosed all of the information requested.

Looking next at the case law, I begin with the principle that an employer must furnish a union with sufficient information, on request, to enable it to represent employees adequately in contract negotiations; *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68 (3d Cir. 1965); *NLRB v. Item Co.*, 220 F.2d 956 (5th Cir. 1955). The information demanded must be relevant, that is, reasonably necessary to the union's performance as bargaining representative of the unit employees. *J. I. Case Co. v. NLRB*, 253 F.2d 149, 153–154 (7th Cir. 1958).

In *A-Plus Roofing, Inc.*, 295 NLRB 967 (1989), the judge stated applicable law at 970:

> Where the request is for information concerning employees outside the bargaining unit, the Union must show that the information is relevant. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.,* 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965). In either situation, however, the standard for discovery is the same: "a liberal discovery-type standard." *Loral Electronic Systems*, 253 NLRB 851, 853 (1980); *Acme Industrial*, supra, at 432, 437. Th(i)s information need not necessarily be dispositive of the issue between the parties, it need only be some bearing on it. . . . [Footnote omitted.] Once the initial showing of relevance has been made, "the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information." *San Diego Newspaper Guild* [*Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977)].

In the instant case, I find contrary to Respondent (Br. at 46–47), that the Union has proven that the information requests in issue are relevant to its statutory duty to represent employees during negotiations. In that respect I look to *I Hardin Developing Labor Law 680* (3d ed.) where the author recognizes that in certain instances, an employer may even be required to divulge information on wage rates paid by its competitors. For this proposition of law, the author cites *General Electric Co. v. NLRB*, 466 F.2d 1177, 1184 (6th Cir. 1972), where the court stated:

> When the Company takes the position that its wage rates are competitive in the local areas and has taken wage surveys of the local areas, which presumably would back up the Company's position, then it is only reasonable that the Union should be given sufficient data to determine whether the Company's position is accurate and justified.

That Respondent is required to supply the information requested by the Union can be supported by other factors. First, Respondent carefully crafted its position to be, not that it was unable to pay, but rather, that it was facing a competitive disadvantage. These positions are analytically distinct, *Steelworkers v. NLRB*, 983 F.2d 240, 243–245 (D.C. Cir. 1993), and lead to rather different discovery rights for the requesting Union. See, e.g., *Stroehmann Bakeries v. NLRB*, 95 F.3d 218, 222–223 (2d Cir. 1996); Cf. *Con Agra, Inc.*, 321 NLRB 944 (1996). That is, under Respondent's current bargaining position, it is required to provide much less information than it would otherwise have to provide. Therefore, Respondent should be required to make a full disclosure of the comparatively small volume of information affected.

I now return to the record. In her letter of December 10, 1996, General Counsel concedes that Respondent did provide information on competitors Robertson and Owl (these two competitors either are or became at some point a single company). However, the General Counsel contends that what was given is far short of what was requested. The Union joins in that argument (Br. at 36–39), but adds a claim that Respondent did not provide information that would have shown that the nonunion companies which Respondent claimed to be its competitors are in fact its competitors.

I find that Respondent did not provide requested information called for in paragraph 4 of the Union's January 16 letter referred to above (Jt. Exh. 14). Further, Respondent did not provide information requested in the Union's February 13 letter (Jt. Exh. 19) published above, such as locations, prices being charged, and number of jobs taken from Respondent.

At page 48 of its brief, Respondent argues that it provided the Union with all the information it was required to give, because "its proposals were based solely upon the lower wages and benefits paid by Owl Rock." As authority for this statement, Respondent quotes Dickerson who testified that he told the Union, "Owl Rock was the competition [Tr. 570] Waggoner, who testified that the company's wage rates it was proposing [were] generally in line with the wage rates Respondent understood to be paid at Owl Rock [Tr. 900] and Billy who testified that the *primary* nonunion competitors about which CalMat was concerned was Owl Rock Products [Tr. 155]." It is clear to me that Respondent has taken some liberties in interpreting the testimony of Waggoner and Billy to its own advantage. Moreover, in Dickerson's letter of January 19 to the Union, he writes in part, "[W]e understand that Owl Rock

Products, a major competitor, *and several smaller operators* are nonunion with lower wages and benefits than CalMat (Jt. Exh. 15, at 1) (emphasis added).

I agree with the Union, page 35 of the brief, citing the case of *Stanley Building Specialties*, 166 NLRB 984, 986 (1967), enfd. 401 F.2d 434 (D.C. Cir. 1968), cert. denied 395 U.S. 946 (1969), where the Board stated:

> [W] e read that case [*NLRB v. Truitt Mfg. Co.*, 351 U.S. 149] rather as announcing principles that are generally applicable to a wide variety of bargaining situations in which good faith obligations under the Act require that a party to bargaining negotiations be willing to substantiate on request a position it has taken during the course of negotiations.

I conclude that Respondent has failed to convey to the Union all the surrounding data called for by the Union's request and that the request was for relevant information. Included among the missing information was the locations of Respondent's [primary and secondary] competitors,[20] wage information regarding other competitors, product prices, and job competitors had taken from CalMat. I further conclude that even if Respondent were correct that only Owl Rock is in issue, despite the abundant evidence to the contrary, I would find that Respondent still has not supplied all information requested, since its interpretation of controlling case law is much too narrow. See *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

Although Respondent does not appear to claim that it did not turn over the requested information because it did not possess same, that too would provide no defense, unless Respondent could show that it could not obtain the requested information. *United Graphics, Inc*., 281 NLRB 463, 465–466 (1986); *NLRB v. Rockwell-Standard Corp.,* 410 F.2d 953, 958 (6th Cir. 1969). In that case, respondent might be called on to explain how it could base its bargaining proposals on information it did not possess and could not obtain.

Based on the discussion above, I find that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint, by failing to provide the Union with the requested information.

2. Impasse

I begin with the case of *Intermountain Rural Electric v. NLRB*, 984 F.2d 1562, 1569 (10th Cir. 1993), where the court stated:

> A bargaining impasse occurs when parties to a negotiation exhaust all possibility of reaching agreement and further negotiations would be futile. . . . To determine whether parties have negotiated in good faith impasse, the Board traditionally considers (a) the parties' bargaining history, (b) the parties' good faith in negotiations, (c) the length of the negotiations, (d) the importance of the issues over which there is disagreement, and (e) the contemporaneous understanding of the parties as to the state of negotiations on the crucial date. *Taft Broadcasting Co.*, 163 NLRB 475 (1967) [enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (1968)].

See also *Brown v. Washington Redskins*, 516 U.S. 1109 (1996).

As further explicated by Administrative Law Judge Kleiman in his Board-approved decision in *Circuit-Wise, Inc.*, 309 NLRB 905, 918 (1992):

> [A] part(y's) declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist—all of the circumstances of the case must be analyzed.[64]
>
> A finding of impasse presupposes that the parties prior to the impasse (had) acted in good faith. Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices.[65] The Board has long held that[,] . . . ["A party] may not parlay an impasse resulting from its own misconduct [into a license to make unilateral changes."][66]
>
> While no unfair labor practice is insignificant, in the context of determining whether an impasse is present[,] some have more significance than others in . . . the negotiating process and its progress. For example, unilateral changes in employees' terms and conditions of employment may constitute significant violations of the Act in the context of which misconduct, no lawful impasse can be reached.[67] [Parentesized material added.]

As the Board stated in *Noel Corp.*, 315 NLRB 905, 911 (1994):

> Although an Employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that effect the negotiations.[33]

To these principles of law, I add another, that because impasse is a defense to the change of an unlawful unilateral change, the burden of proof rests on the party asserting that impasse exists. *North Star Steel Co.*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992).

The General Counsel contends that Respondent's failure to furnish the information in issue is just such an example of a serious unremedied unfair labor practice. I agree.

> A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to

[20] At pp. 160–161 of the transcript, counsel for Respondent stated information as to location of Owl Products, the "*biggest* competitor CalMat was concerned about" was not conveyed because the Union already knew its location or had access to that information. Putting aside the issue about locations of *smaller* competitors, and putting aside the Union evidence that while it may have known about one location for Owl Rock in Irvine Lake, California, it didn't know if there were additional locations and if so, where they were, I note the case law that even if requested information was available from another source, that fact is no defense. *New York Times Co.*, 265 NLRB 353 (1983).

[64] *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). Also see *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

[65] *White Oak Coal Co.*, 295 NLRB 567 (1989); *LaPorte Transit*, 286 NLRB 132 (1987), enfd. 888 F.2d 1182 (5th Cir. 1989).

[66] *Wayne Dairy*, 223 NLRB 260, 265 (1976).

[67] *White Oak Coal Co*., supra, ...

[33] *Columbian Chemicals Co*., 307 NLRB 592, 592, 596 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1993); *J.W. Rex Co*., 308 NLRB 473, 473, 496 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993).

> provide information needed by the bargaining agent to engage in meaningful negotiations. "A failure to supply information relevant and necessary to bargaining constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances." [*Decker Coal Co.*, 301 NLRB 729, 740 (1991).]

(Dispute over information requested where pension plan in issue). See also *Genstar Stone Products Co.*, 317 NLRB 1293, 1299–1300 (1995); *Crane Co.*, 244 NLRB 103, 111–112 (1979); *Palomar Corp.*, 192 NLRB 592, 597–598 (1971), enfd. 465 F.2d 731 (5th Cir. 1972).

I conclude that Respondent's failure to make a full and complete response to Respondent's Information Requests which I have found relevant preclude a lawful impasse from being declared.[21] The information at issue was needed by the Union in order to engage in meaningful negotiations about the major concessions demanded by Respondent over wages and benefits. Even though the pension issue appears from the record to be equally intractable, if not more so, as the wage and benefit concessions, the pension issue is not directly affected by the information requests. The evidence suggesting that the Union desired to resolve the pension issue first and then turn to the wage and benefit concessions does not convince me that the parties would have been at impasse even if the information at issue had been conveyed to the Union. Rather there is reason to believe that one side or the other may well have decided to settle on the wage and benefit issues and then turn to the pension matter, if Respondent had provided the information requested to be produced. In fact, the Union did make one or more minor concessions in certain areas such as holidays and vacations. In *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337 (1977), the Board found that the willingness of a party to make concessions in some areas suggested a willingness to make further concessions in order to reach agreement. I add that this would be particularly true in the instant case, had Respondent turned over the information requested by the Union.

In light of my findings above, it is unnecessary to engage in any detailed analysis of the *Taft Broadcasting Co.* factors recited above. Nonetheless under the holding of *Old Man's Home of Philadelphia*, 265 NLRB 1632, 1634 (1982), as applied to the instant case, lack of impasse would be probable. Compare, *Bell Transit Co.*, 271 NLRB 1272 (1984).

I also find in light of my findings above that it is unnecessary to determine whether Respondent has carried its burden of proof to show that Respondent may escape liability under the Act for premature declaration of impasse and subsequent implementation when, in response to an employer's "diligent and earnest efforts" to engage in bargaining, a union insists on continually avoiding or delaying bargaining; *Serramonte Oldsmobile*, 318 NLRB 80, 100 (1995), enfd. in part 86 F.3d 277 (D.C. Cir. 1996). In the present case, under the holding of *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning,* 15 F.3d 1083 (9th Cir. 1994), it would be unlikely that Respondent could make the necessary showing on this record. One or more meetings were canceled due to the illness in the family of Union Negotiator Billy and other delays may have been due to the Union's awaiting answers to the information requests.[22] See *Don Lee Distributors*, 322 NLRB 470 (1996).

I have not overlooked the Union's alleged regressive bargaining nor its failure in some cases to prepare written proposals. To the cases cited by respondent at pages 37–40 of its brief, I add the case of *Golden Eagle Spotting Co. v. NLRB*, 93 F.3d 468, 469 (8th Cir. 1996), where the court noted that regressive bargaining is evidence of bad faith[23] and *Louisiana Dock Co.*, 293 NLRB 233, 235, revd. in part 909 F.2d 281 (7th Cir. 1990), where the Board said in another context, "a Union cannot be heard to protest [an employer's] unilateral actions [where] it was the Union's own acts which foreclosed effective negotiations." All of this is well and good but I find that where Respondent failed to supply the information at issue, Respondent effectively removed the Union's conduct as an issue from this case.

For the same reason, I leave open the question of whether Respondent was engaged in "diligent and earnest efforts" to engage in bargaining. For example, I note that in a few occasions, Respondent submitted new proposals to the Union in which no changes were evident.

For the reasons cited above, I conclude that Respondent's implementations of its final offers on March 6 (wages and health and welfare), on July 1 (pension contribution rate), and August 21 (most remaining items), before negotiations reached impasse, were in violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Wycoff Steel, Inc.*, 303 NLRB 517, 523 (1991).

3. The strike—economic or unfair labor practice

On or about March 5, the Union called a meeting of its members. Here, Waggoner complained about the course of negotiations and a strike was discussed, but not called because Respondent did not implement all of the cuts and changes that were in the last and final offer (Tr. 210). However, union officials told the assembly they intended to file a charge with the Board against Respondent for bad-faith bargaining.

On or about July 16, Waggoner called another meeting in which all employees of the unionized rock, sand and gravel industry attended, about 300–400 in number. Waggoner addressed the members commenting on Respondent's last, best and final offer, the implementation and the Union's charge filed with the NLRB. Waggoner commented to the members that he felt Respondent was engaged in bad-faith bargaining. Members unanimous approval of the strike which began on or about

[21] If the Board finds that I erred in this finding, then under the authority of *Concrete Pipe & Products Corp.*, 305 NLRB 152 (1991), enfd. sub nom. *Steelworkers v. NLRB*, 982 F.2d 240 (D.C. Cir. 1993), the Union's insistence on economic data which it had no right to, may give rise to an objectively reasonable declaration of impasse. See also *E. I. du Pont & Co.*, 268 NLRB 1075 (1984).

[22] On the other hand, parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective-bargaining negotiations, as they display in other of their business affairs. *West Coast Liquidators*, 205 NLRB 512, 516 (1973). The busy schedule of its negotiators is no defense to this obligation. *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978). Labor relations matters are urgent matters too. *Insulating Fabricators, Inc.*, 144 NLRB 1325, 1328 (1963), enfd. 338 F.2d 1002 (4th Cir. 1964).

[23] However, the fact that a proposal is "regressive" does not establish that it is made in bad faith (citations omitted). There is nothing in economics or law which suggests that employment terms must always improve or even stay the same. *Con Agra, Inc.*, supra, 321 NLRB at 947 (Member Cohen, dissenting in part).

July 26 was based in part over the implemented cuts in pay and benefits.

Turning to the picket signs carried by the strikers, I note that the legend reads "Local 12" in print and "International Union of Operating Engineers" in smaller black printing, "AFL–CIO," "On Strike" and "Unfair Labor Practices" printed in 6 to 8 inches bold print. The parties stipulated that at certain points during the strike, the picket signs lacked the words "Unfair Labor Practices" (Tr. 234–237).

Beginning in the fall, strikers distributed to the public union handbills which read as follows:

Question?

Why are we on Strike Against
the Rock, Sand & Gravel and
Asphalt Industries?
The answer is simple—
EMPLOYERS GREED!
CalMat and Hanson control approximately 70 percent
of the materials in Los Angeles basin that goes into the
making of asphalt and concrete.
CalMat and Hanson had combined PROFITS OF
OVER $19 MILLION
in 1994. How did they reward their workers?
BY CUTTING WAGES & BENEFITS
25 PERCENT!
How much more PROFIT do they want?
How much is enough? You be the judge!

[R. Exh. 25.]

In a letter to the Mayor of Vista, California, dated September 28, Waggoner purported to explain why members were on strike "when the companies insisted on a 25 percent wage reduction for the rock, sand and gravel industry, the workers voted to strike" (R. Exh. 24). There is no mention in the letter or the handbill of any alleged unfair labor practice by Respondent.

Although the evidence with respect to the picket signs, the handbills and the letter to the mayor of Visa tends to show the strike was economic in nature, e.g., there is no showing when the "unfair labor practice" was added to the picket sign, I find the strike is an unfair labor practice strike. As a basis for this conclusion, I note Respondent's unlawful refusal to supply information in the context of bargaining proposals seeking substantial concessions from the Union. I also note that at the Union meetings of March 5 and July 16, union officials informed the membership that Respondent was bargaining in bad faith. In these circumstances, there is a causal relationship between Respondent's unfair labor practices and the strike. *Genstar Stone Products*, supra, 317 NLRB at 1994. See also *Henry Miller Spring Co.*, 273 NLRB 472, 477 (1984).

Unfair labor practice strikers are entitled to reinstatement upon making an unconditional offer to return to work. *Dilling Mechanical Contractors, Inc.*, 107 F.3d 521 (7th Cir. 1997), and cannot be permanently replaced. *Walnut Creek Honda,* 316 NLRB 139, 142 (1994), enfd. 89 F.3d 645 (9th Cir. 1997).

As of this writing, the strike continues, and no unconditional offer to return to work has been made.

CONCLUSIONS OF LAW

1. The Respondent, CalMat Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union of Operating Engineers, Local 12, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union with the following requested information, Respondent has violated Section 8(a)(5) and (1) of the Act.

(a) Any and all memos, reports, studies, records, or other documents within the Employer's possession and/or control which analyze any of the following factors with respect to the Employer: competitors, productivity, labor and material cost, prices, profits, and losses.

(b) As to all competitors, locations of all plants; number of Operating Engineers employed; prices being charged; number of jobs taken from CalMat.

(c) As to Triangle Rock, name of owners, information as to deal at Irvine Lake, and how employees will be affected.

4. By implementing changes in its employees terms and conditions of employment on or about March 6, July 1, and August 21, at which time no valid bargaining impasse existed, Respondent refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

5. The strike which began July 26, was an unfair labor practice strike from its inception, and the striking employees are unfair labor practice strikers.

6. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the polices of the Act.

Specifically, I recommend that Respondent be ordered to provide the Union with the information requested on January 16 and February 13 in a prompt manner.

I further recommend that Respondent be ordered to bargain in good faith with the Union until agreement has been reached or a valid impasse has been reached. In addition, Respondent must be ordered to restore terms and conditions prevailing in the collective-bargaining agreement which expired on September 15, 1994, and to make employees whole for any lost wages and benefits incurred as a result of the unilateral changes made in those terms and conditions of employment on or about March 6, July 1, and August 21. Respondent shall be further ordered to maintain those terms and conditions of employment in effect until the parties have bargained to agreement or to impasse.

In accord with the Board's established policy to require employers to reinstate unfair labor practice strikers within 5 days after said strikers make a full and unconditional offer to return to work, I will recommend such a provision in the Board's Order.

Respondent also shall be ordered to cease engaging in any like or related conduct.

[Recommended Order omitted from publication.]